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No. 02 760

In The Supreme Court of the United States

ARMADA OIL AND GAS COMPANY ALLIE BERRY; ALI K. JAWAD; SAM HADDAS,
Petitioners,

v.

PDV MIDWEST REFINING, L.L.C.; CITGO PETROLEUM CORPORATION, INDIVIDUALLY AND AS ADMINSTRATOR OF THE UNO-VEN MARKETER AGREEMENTS,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTION PRESENTED FOR REVIEW

WHETHER A VOLUNTARY RELINQUISHMENT OF A TRADEMARK CONSTITUTES A "LOSS OF TRADEMARK" AS CONTEMPLATED BY THE PETROLEUM MARKETING PRACTICES ACT, 15 U.S.C. § 2801 ET. SEQ.

The United States Court of Appeals for the Sixth Circuit Answered the Question "Yes."

The United States District Court for the Eastern District of Michigan Answered the Question "Yes."

Petitioners Contend that the Answer is "No."

Respondents Contend that the Answer is "Yes."

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Plaintiffs/Counter Defendants-Appellees

PDV Midwest Refining, L.L.C.,

Citgo Petroleum Corporation

Defendants/Counter Plaintiffs-Appellants

Armada Oil and Gas Company

Allie Berry

Ali K. Jawad

Sam Haddas

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STATUTE INVOLVED

Petroleum Practices Marketing Act, 15 U.S.C. § 2801 *et. seq.* set forth in the Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, at E1-E29.

Armada Oil and Gas Company, Allie Berry, Ali K. Jawad, and Sam Haddas respectfully request that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit on the merits is reported, and is re-produced in App. A1. The decision of the United States Court of Appeals for the Sixth Circuit denying the petition for rehearing and suggestion for en banc hearing is unreported and is re-produced in App. A57. The order of the United States District Court for the Eastern District of Michigan granting in part and denying in part plaintiff's motion for summary judgment is unreported and is re-produced in App. B1. The memorandum opinion and order containing the court's finding of fact and conclusions of law of the United States District Court for the Eastern District of Michigan is unpublished and re-produced in App. B40. The final judgment of the United States District Court for the Eastern District of Michigan is re-produced in App. B83.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was issued on September 5, 2002. A timely petition for rehearing was denied by that court on _____. This Court has jurisdiction under 28 U.S.C. § 1254(1). The original cause of action was subject to the federal court jurisdiction by way of diversity jurisdiction, because there was complete diversity among the parties. The district court's jurisdiction was invoked under 28 U.S.C. § 1332. The district court observed that it had jurisdiction of the counterclaim pursuant to 28 U.S.C. § 1331. App. B44.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

The counterclaim, filed on July 3, 1997, was brought pursuant to the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et. seq.*, and sought damages, costs and attorney fees.

Petitioner Armada Oil and Gas Company ("Armada") is a distributor or jobber of petroleum

products, principally gasoline, some of which it distributes under licensed brand names or trademarks of large oil and refining companies. In 1990, Armada purchased a Union 76 jobbership and entered into a Marketer Sales Agreement with Uno-Ven dated July 31, 1990. The purchase and Agreement gave Armada a franchise right to distribute Uno-Ven petroleum product under the Union 76 trademark, which was licensed to Uno-Ven by the trademark owner Unocal under a perpetual license that gave Uno-Ven the exclusive right to use of the trademark in the Midwest United States, including Michigan.

On January 1, 1995, Armada and Uno-Ven renewed their relationship in a written Marketer Sales Agreement. Unocal was a 50 percent partner in Uno-Ven. The other 50 percent partner was Respondent Appellee PDV Midwest Refining ("PDV-MR").

Jerald Thompson is the President of PDV-MR and a Senior Vice President of CITGO. The business of PDV-MR and Respondent CITGO includes the refining and sale of gasoline under trademark, including the CITGO trademark. PDV-MR and CITGO are subsidiaries of a company called PDV America ("PDV").

For some time prior to December 1996, and in fact going back as far as the early 1990s, the PDV entities and

Unocal negotiated regarding the possibility of the PDV entities buying out Unocal's interest in Uno-Ven, due to Unocal's desire to withdraw from the refining and marketing aspects of the petroleum business. In late 1996, beginning in approximately July 1996, Armada became concerned about its investment and its long-term relationship with Uno-Ven, because of information and rumors in the market that Uno-Ven was selling out to CITGO or withdrawing or pulling out of the Midwest market, and CITGO jobbers were soliciting Armada's customers and telling them that Uno-Ven was pulling out. Some of the Union 76 dealers who were Armada customers began switching to competitors' brands in 1996 and early 1997 in response to the rumors and information that Uno-Ven was pulling out.

The General Partners in Uno-Ven ultimately reached an agreement for the dissolution of the Uno-Ven Joint Partnership on December 26, 1996, as evidenced by a Letter of Intent executed on that date. Pursuant to that Letter of Intent, Uno-Ven voluntarily terminated its right to use the Union 76 trademark in connection with the sale of the trademark rights to another entity. Uno-Ven then transferred the balance of its assets to its other General Partner, PDV-MR.

According to Marty Sedlacek in his Fed.R.Civ.P. 30(b)(6) deposition on behalf of both CITGO and Uno-Ven, at some point in 1996, months before the December 26, 1996 execution of the Letter of Intent, Unocal sold its rights to the Union 76 trademark to a company called Tosco some time in 1996, well before the December 26, 1996 execution of the Letter of Intent. At trial, Mr. Sedlacek contradicted that testimony and suggested that the sale occurred in the spring of 1997.

On April 30, 1997, Uno-Ven sent Armada two letters advising it of the transaction embodied in the Letter of Intent, one of which indicated that Armada's franchise would be terminated because Uno-Ven has lost the right to grant the use of the trademark which is the subject of the franchise. On May 1, 1997, PDV and Unocal closed on a transaction in which Unocal sold the refining and marketing assets of Uno-Ven to PDV-MR. As of the closing, all of the assets of Uno-Ven were to be distributed, and Uno-Ven would immediately cease operations as an ongoing refining and marketing company.

Mr. Sedlacek testified in deposition that Unocal's involvement with Uno-Ven constituted a partial withdrawal from the Midwest market, and that Unocal's sale of the

assets of Uno-Ven marked its complete withdrawal from that market.

Armada's franchise was terminated on May 1, 1998.

B. COURSE OF PROCEEDINGS

This case was filed by Respondents as a collection action related to petroleum product delivered to Armada. Petitioners' counterclaim was based upon the termination of their franchise relationship with Respondents and their affiliates, asserting that the termination was in violation of the PMPA and had caused Petitioners substantial damages in excess of the price of the petroleum product at issue. Petitioners further asserted that they refused to pay for the product only upon learning of the illegal termination of the franchise.

Respondents' claims were for approximately three million dollars, whereas Petitioners claimed damages in excess of eleven million dollars, exclusive of interest. This amount consists of lost profits of $5,080,421.70, lost business value of $4,503,285, and rebranding expenses of $1,956,542. In addition to these damages, Armada sought to recover reasonable attorney fees and expert witness fees

in accordance with 28 U.S.C. 2805(d)(1)(A) and (C) and exemplary damages in accordance with 28 U.S.C. 2805(d)(1)(B) and (C)(2).

Respondents filed a motion for summary judgment, seeking a judgment in their favor as to both their "collection" claims and the counterclaim. Petitioners filed a response. By a stipulated order, the claims against Unocal and Uno-Ven were dismissed, with Respondents agreeing to accept responsibility and liability for any violations of the PMPA by either of those entities. The district court declined to hear oral argument on the summary judgment motion, and on October 1, 1999, the court issued an Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment. App. B1. The court granted summary judgment against Petitioners as to the bulk of the claimed amount due, finding that a question of fact existed as to the balance. App. B2, B12-16. The court also granted summary judgment against Petitioners as to their claim that the voluntary transfer of Uno-Ven's rights to grant the use of the trademark at issue (the stated ground for the franchise termination) was not a "loss" of those rights within the terms of the PMPA, and thus not an allowable ground for franchise termination under the PMPA. App. B3, B26-30. The court denied summary

judgment as to Petitioners' claims that there had been a violation of the notice of-termination provisions of the PMPA, and that the true reason for the termination had been a withdrawal from the relevant geographic market, as to which the procedures and showings required by the PMPA had not been met. App. B3, B22-24.

The parties ultimately reached a settlement as to all of Respondents' claims, which included an agreement precluding recovery of any settlement proceeds until after the final judgment as to the portions of the counterclaim remaining for trial or the outcome of an appeal to the United States Court of Appeals for the Sixth Circuit. The portions of the counterclaim that had survived summary judgment were tried before the district court from June 23, 2000 to July 10, 2000.

On October 3, 2000, the District Court issued a Memorandum Opinion and Order Containing the Court's Findings of Fact and Conclusions of Law. App. B40. The Memorandum Opinion resolved the remaining claims against Petitioners, and included findings that the sale of the trademark rights had occurred in March 1997 (rendering the notice of termination to Armada timely and proper under the PMPA) and that there had not been a withdrawal from the relevant (Midwest) geographic market

under the terms of the PMPA. App. B41, B47, B71-72. On November 30, 2000, the district court entered a final judgment incorporating the trial result and the relevant terms of the settlement as to the Respondents' claims. App. B83-86.

Petitioners filed a timely notice of appeal on December 18, 2000. The United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment. App. A3.

Petitioners filed a timely petition for rehearing and suggestion of en banc hearing. On November 7, 2002, the United States Court of Appeals for the Sixth Circuit denied the petition. App. A57.

REASONS FOR GRANTING THE WRIT

This Case Involves the Interpretation of a Federal Statute with Respect to Provisions that Have Never Been Addressed by this Court and that the Court Below Erroneously Interpreted so as to Hold that a Franchisor May Voluntarily Relinquish Its Right to a Trademark and thereafter Terminate a Franchise on the Basis of "Loss" of Trademark.

The decision below, PDV Midwest Refining, L.L.C.

v. Armada Oil and Gas Co., ___ F.3d ___ (6th Cir. 2002) (Docket No. 00-2503, issued September 5, 2002) ("Opinion"), is the sole binding United States Court of Appeals decision to determine whether a franchisor may rely upon 15 U.S.C. § 2802(c)(6) as a basis for the termination of a franchise, where the franchisor voluntarily relinquished its "right to grant the right to use the trademark which is the subject of the franchise." App. A5. Petitioners submit that the court erroneously relied on the acknowledged dicta in Russo v. Texaco, Inc., 808 F.2d 221 (2d Cir. 1986).

This proceeding involves a question of exceptional importance. The district court had decided that, under the PMPA, 15 U.S.C. § 2801 et seq., App. E1-E29, a franchisor may voluntarily relinquish its right to a trademark and may then predicate its cancellation of a franchise upon the "loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise." 15 U.S.C. § 2802(c)(6). App. A5, A25.

The lower appellate court held that "the voluntary loss of a trademark can serve as a valid means of terminating a franchise relationship under the PMPA." App. A32. In doing so, it relied upon Russo. App. A25-30. However, Russo was not binding precedent for **this**

conclusion, because the loss of trademark in Russo in that case was actually involuntary. As ultimately noted by the court in Russo, the court did not need to reach the question presented here of whether a voluntary divestiture could serve as a valid basis for a termination inasmuch , the divestiture of the trademark in Russo had been imposed by the Federal Trade Commission. Russo, 808 F.2d 227-228. Indeed, the court below acknowledged that its reliance on Russo was in fact reliance on dicta. App. A28-29.

Because the Russo dicta advocates a proposition that has never been addressed by this Court and that promotes the interpretation of a federal statute in a manner that adversely affects thousands of franchisees, review of this case of first impression is certainly merited. This is particularly true since the Russo dicta has, by virtue of the present case, been elevated beyond mere dicta, and is now being advanced as the rule for the Sixth Circuit.

Russo's reasoning may be summarized as follows:

1. The PMPA, 15 U.S. C. § 2802(c)(4), establishes as a ground for permissible termination of a franchise, "loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease."

2. Pursuant to the legislative history and case law,

"expiration of an underlying lease" may be deemed to have occurred even though the franchisor voluntarily relinquished the right to grant possession of the premises by failing to exercise a right to renew or extend the lease, and a "voluntary relinquishment," as thus defined, constitutes a "loss" under the PMPA. In other words, the PMPA does not create an obligation, on the part of the franchisor, to renew or extend an underlying lease.

3. Section 2802(c)(6) establishes as a ground for permissible termination of a franchise, "loss of the franchisor's right to grant the right to use the trademark, which is the subject of the franchise."

4. Because the word "loss" is used in both sections, the doctrine of *in pari materia* applies, and accordingly, a voluntary relinquishment of the trademark qualifies as a loss under the Act.

However, the Russo analysis was unsound. After the court explained that 15 U.S.C. § 2802(c)(4) permitted a voluntary relinquishment of the right to grant possession of premises, it simply recited the doctrine of *in pari materia* and uncritically asserted that "loss" in 15 U.S.C. § 2802(c)(6) should be similarly interpreted. This logic is flawed for two reasons. First of all, it does not address the fact that "voluntary relinquishment" does not have the same

definition under the Russo analysis of the two sections. Moreover, the doctrine of *in pari materia* cannot be so woodenly applied.

Sutherland Stat Const § 51.02—51.03 (5th Ed.) explained the doctrine of *in pari materia*. The legislature is presumed to be aware of other statutes. "Experience indicates that a legislature does not deliberately enact inconsistent provisions when it is cognizant of them both, without expressly recognizing the inconsistency." Sutherland, § 51.01, p. 118. The court uses the doctrine to promote harmony in achieving the legislative objects, goals, and purposes.

> Characterization of the object or purpose is more important than characterization of subject matter in determining whether different statutes are closely enough related to justify interpreting one in light of the other.
>
> . . .
>
> The functions of characterization and classification are of critical importance in determining whether impressions from one statute should influence judgment about how another statute should be interpreted. . . . The guiding principle, however, is that if it is natural and

> reasonable to think that the understanding of members of the legislature or persons to be affected by a statute, be influenced by another statute, then a court called upon to construe the act in question should also allow its understanding to be similarly influenced.

Sutherland, § 51.03, pp. 138-139 (footnotes omitted).

The proper application of the doctrine is straight forward. Congress explicitly considered a franchisor's leasehold, subleased to the franchisee. Intrinsically, a leasehold exists for a limited duration. Thus, as to an underlying lease, the franchisor is not required by the statute to renew the underlying lease, and may instead voluntarily relinquish its right to a lease upon the lease's scheduled expiration and then terminate the franchise based on the "loss" of the lease. Section 2802(c)(4). However, such a "loss" may be relied upon only upon compliance with certain preconditions regarding notice given prior to creation of the franchise, advising the franchisee that such may occur. Hence, "voluntary relinquishment" as used in the loss of lease analysis is subject to strict restrictions, but Russo's dicta, and the Sixth Circuit holding in this case apply the "voluntary relinquishment" concept to the loss of trademark provision without such restrictions.

Compliance with the notice restrictions is the *sine qua non* for the safe harbor. (See, Russo, 808 F.2d 225, citing Lugar v. Texaco, 755 F.2d 53, 59 (3rd Cir. 1985), for the proposition that an event enumerated by 15 U.S.C. § 2802(c) is conclusively presumed to be an acceptable basis for termination.) Accordingly, there is no proper basis for linking 15 U.S.C. § 2802(c)(4) and 15 U.S.C. § 2802(c)(6).

For application of the doctrine to the loss of a trademark, if it should be applied at all, 15 U.S.C. § 2802(c)(5) and 15 U.S.C.§ 2802(c)(7) supply guidance. These subsections provide:

> (5) Condemnation or other talking, in whole or in part, of the marketing premises pursuant to the power of eminent domain;
>
> (7) destruction (other than by a franchisor) of all or a substantial part of the marketing premises;

Functionally, these sections speak to an event that parallels the loss of a trademark. Ordinarily, the franchisor owns the trademark. However, the trademark may be lost, just as marketing premises may be condemned or destroyed, involuntarily. Russo's fixation on "loss" elevates form over function. Subsections (5) and (7), although without

the word "loss," provide far better guidance regarding the loss contemplated in subsection (6).

More fundamentally, there is no reason to apply the doctrine. Each subsection is entirely capable of independent construction, with no disharmony or frustration of legislative purpose. Whereas 15 U.S.C. § 2802(c)(4) explicitly refers to voluntary loss and explicitly restricts what voluntary losses qualify, 15 U.S.C. § 2802(c)(6) does not reference voluntary loss at all, and certainly does not suggest the allowance of totally unrestricted voluntary losses. Therefore, the doctrine is inapplicable in the face of unambiguous contrary language.

Russo relied upon legislative history that is applicable to § 2802(c)(4), only.

> The Senate Report makes clear that where a franchisor's *voluntary* decision not to renew an underlying lease results in the "loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease," termination is nevertheless reasonable under § 2802(b)(2)(C). Senate Report at 38, *reprinted in* 1978 U.S.Code Cong. & Ad.News at 896 ("Expiration of the underlying lease could occur under a variety of circumstances

including, for example, a decision by the franchisor not to exercise an option to renew the underlying lease"). [Emphasis by court.]

Russo, 808 F.2d 227. However, by citing the legislative history, Russo preached to the choir; it is undisputed that 15 U.S.C. § 2802(c)(4) extends to a voluntary loss in the form of a failure to exercise a right to extend or renew an expired lease. Indeed, the legislative history actually undermined Russo's conclusion. It spoke to the permissibility of a voluntary loss of a lease but conspicuously excluded a loss of a trademark from its discussion. *Expressio unius est exclusio alterius.* It can be fairly inferred that the legislature eschewed the "voluntary loss" in the context of 15 U.S.C. § 2802(c)(6).

Although the express definition of a term in a statutory subsection may imply a similar definition elsewhere, e.g., Van Guilder v. Collier, 248 Mich.App. 633, 650 N.W.2d 340 (2001), it is an unjustified stretch to assume that an expressly defined, limited and regulated "loss of . . . right to grant possession . . . through expiration of an underlying lease" is substantially the same as a totally unrestricted "loss of right to grant the right to use trademark." Equating the two serves to significantly

broaden the right to "voluntarily relinquish" property. Moreover, there is a wide chasm dividing intellectual property from physical property. The parallel should not be drawn upon such slight evidence.

The doctrine of *in pari materia* does not require a straitjacket approach to the law. Rather, the doctrine requires the court to construe one statute so that it does not impede the function of a second statute, devoted to the same goal.

In Molzof v United States, 502 U.S. 301, 112 S.Ct. 711, 116 L.Ed.2d 731 (1992), this Court held that "loss of enjoyment of life" damages were not punitive and were, therefore, permissible under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et. seq.* This Court rejected the contention that "punitive damages" in the first and second clauses of § 2674 should be construed *in pari materia*, finding that such a construction led to an unpalatable conclusion. Molzof, 502 U.S. 308-312.

Demarest v Manspeaker, 498 U.S. 184, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991), reached the same conclusion. Demarest, an inmate, claimed witness fees under 28 U.S.C. § 1821, for attending a federal criminal trial pursuant to a habeas corpus writ *ad testificandum*. The respondent contended that 28 U.S.C. § 1821 should be construed *in*

pari materia with 28 U.S.C. § 1825, which imposed a subpoena requirement. Demarest, 498 U.S. 189. Although this Court acknowledged that the respondents' reading of the two sections was "literally plausible," it rejected the proposed construction. Demarest, 498 U.S. 189-191. This Court observed that the respondents' argument was without support in the statutory language. Demarest, 498 U.S. 189-190. Accordingly, more substantial considerations of statutory construction overcame the argument for application of the *in pari materia* doctrine.

In People v. Stephan, 241 Mich.App. 482, 498, 616 N.W.2d 188 (2000), the court found that the "guilty but mentally ill" statute and the insanity defense were "components of a common legislative scheme and should be read *in pari materia*, if possible." The court opined that the doctrine's goal was "harmonious construction" to realize "compatibility of legislative purpose," id., 497-498:

> The object of the in pari materia rule is to further legislative intent by finding an harmonious construction of related statutes, so that the statutes work together compatibly to realize that legislative purpose. Therefore, if two statutes lend themselves to a construction that avoids conflict, that construction should control. Two statutes that

> form "a part of one regulatory scheme" should be read in pari materia. [Citations omitted.]

The doctrine is thus merely an aid to proper statutory construction, not an end unto itself. It must not be employed where its application will defeat rather than implement the legislative intent.

In this case, the faint case for application of the doctrine is overwhelmed by arguments to the contrary. There is an express limitation upon "voluntary relinquishment" as it relates to a loss of lease, but no such limitation as it was applied by the Sixth Circuit with respect to a loss of trademark. Moreover, there is an obvious distinction between a lease and a trademark—the first is transitory; the second is not. There is no rationale for treating these distinct entities alike. In this instance, identical treatment does not foster harmony, and dissimilar definitions of "loss" do not lead to an anomaly. Indeed, the converse is true. Russo's short-sighted determination to identically define "loss" with respect to both subsections leads to dissimilar treatment between loss of lease and loss of trademark.

Clearly, there is no parallel between 15 U.S.C. § 2802(c)(4) and 15 U.S.C. § 2802(c)(6). 15 U.S.C. §

2802(c)(4) explicitly anticipates a voluntary loss. See, 15 U.S.C. § 2802(c)(4)(B) and the criteria limiting a voluntary abandonment. However, 15 U.S.C. § 2802(c)(6) has no such provision. The franchisor may terminate a franchise based on the expiration of the lease, only if, before the franchise commenced, the franchisee had been notified of (a) the duration of the underlying lease, and (b) the fact that the lease might expire or not be renewed. 15 U.S.C. § 2802(c)(4)(A)(i), (ii). The notice requirements are not mere technicalities. In Hutchens v. Eli Roberts Oil Co., 838 F.2d 1138, 1142 (11th Cir. 1988), the court took note of the applicable notice requirements:

> Having found that Roberts Oil's decision not to renew Hutchens' sublease was justified under the PMPA, we must decide whether Roberts Oil satisfied the Act's notice requirements. This case involves three separate notice requirements. In addition to the general notice requirement of section 2804, both section 2802(b)(2)(C) and section 2802(c)(4) contain notice provisions that must be satisfied by franchisors that rely on those sections to justify termination or nonrenewal.

It defies imagination that Congress would impose

significant limitations upon the franchisor's voluntary relinquishment of a leasehold and impose no limitations upon the voluntary abandonment of a trademark, each of which is a predicate for termination of a franchise. The plain inference is that the statute distinguishes between the relinquishment of a leasehold (or, more accurately, a decision not to renew a lease) and the abandonment of a trademark.

Russo's failure to discern the distinct statutory difference between the expiration of a lease and a trademark is inexplicable. It is incomprehensible that the Russo court "perceive[d] of no reason to construe § 2802(c)(6) differently from § 2802(c)(4)." 808 F.2d 227. The Russo decision, although purporting to treat the trademark situation in the same manner as the lease situation, did no such thing. Whereas the relinquishment of a lease is subject to severe constraints, the Russo decision, albeit dictum, imposes no restraints upon the abandonment of a trademark. Moreover, it is clear that no one would now suggest that loss, as defined in Russo, could be applied to the "loss" of a lease. Otherwise, one would reach the absurd result that a voluntary termination of a lease, in midterm, and without prior notice, would serve as a valid basis for terminating a franchise based upon the loss of a

lease.

Last, the lower appellate court proposed, relying upon Lorillard v. Pons, 435 U.S. 575, 580-81, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978), that Congress ratified the Russo decision by re-enactment of the statute. App. A34. This Court, however, constrained the doctrine of ratification in Fogerty v. Fantasy, Inc., 510 U.S. 517, 528-532, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994). Moreover, on the facts presented by this appeal, the argument for ratification is palpably erroneous. As noted above, Russo ultimately found that Texaco's relinquishment of the trademark was involuntary. Congress cannot be expect to assume that courts would utilize this dicta as binding authority, and its failure to amend the statute in response to mere dicta cannot be fairly construed as agreement with the dicta.

Petitioners turn to an anticipated argument by Respondents, to wit, that the outcome below is correct, for an alternative reason. Specifically, Respondents may contend that the loss of trademark was one of two bases for termination of the franchise, and that the second basis was sufficient.

Petitioners submit that Respondents formally relied upon only one event to justify its termination of the franchise. The letter of April 30, 1997, the only document

germane to this issue, included both a background description of the circumstances and a formal notification. The appellate court below referred to the background description to find that Respondents stated two reasons for termination. App. 37-38. However, the formal notification portion of the letter stated:

> In compliance with the provisions of the Petroleum Marketing Practices Act, you are hereby notified that the grounds for the above action are that:
>
> 1. An event has occurred which is relevant to the franchise relation and as a result of which termination of the franchise and non-renewal of the franchise relationship is reasonable.
>
> 2. UNO-VEN has lost the right to grant the use of the trademark which is the subject of the franchise.

Respondents submitted only one genuine reason for termination, the loss of trademark. The "event has occurred" declaration merely repeats statutory language, 15

U.S.C. § 2802(b)(2)(C), that by the statute's own terms includes the loss of the right grant the use of the trademark, 15 U.S.C. § 2802(c)(6). This declaration gives notice of **some** event that will serve as a basis for termination, effectively identifying **no** event. Indeed, the court below was forced to import an explanation of this basis in order to find that it could serve as an alternative basis. Hence, the court found that the referenced "event" was a "restructuring," which was not expressly set forth in the notice and which, therefore, cannot serve as a basis for termination.

The statute requires that the basis be set forth in such a manner as to give notice of the true reason and must do so with particularity. The mere recitation of the statute, without more, cannot serve as a basis, and the court cannot **import** explanations of "events" that are not set forth by the franchisor. Hence, there was only one valid reason stated in the notice. Because the sole basis for termination of the franchise, cancellation of the trademark, was insufficient, the lower appellate court wrongly affirmed the district court's judgment.

Assuming *arguendo* that Respondents presented two reasons for termination, the court below should nevertheless have remanded this matter to the district court.

The lower appellate court acknowledged that both reasons "are clearly related, and that as such, **both events combined** create **a valid reason** for the termination." (Emphasis added.) App. A43. There is no indication that the "events" would provide **two valid reasons** for the termination. Instead, the court elsewhere characterized the offered reasons as "related and intertwined." App. A49. Where one of the intertwined, closely related reasons is fatally flawed, remand is called for. (Elsewhere, the court indicated that the first enumerated reason could stand alone. App. A43.)

In Hardaway v. Withrow, 147 F.Supp.2d 697 (E.D. Mich. 2001), the court reversed because a manslaughter verdict might have been predicated upon an erroneous jury instruction.

> A general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground. When two theories of culpability are submitted to the jury, one correct, and the other incorrect, it is impossible to tell which theory of culpability the jury followed in reaching a general verdict.

[Citations omitted.]

See, Griffin v. U.S., 502 U.S. 46, 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991), citing with approval, Yates v. U.S., 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957), holding that a general verdict must be reversed where one basis for conviction was legally invalid.

This case is analogous. Respondents justified termination by the loss of trademark. If the fact finder had recognized the legal insufficiency of the loss-of-trademark justification, the fact finder would have, in all probability, found the vague, "alternative" reason for termination insufficient. At a minimum, this is an open question. Undoubtedly, the district court's failure to recognize the invalidity of the loss-of-trademark reason was material. Accordingly, the district court, as fact finder, must be given the opportunity to reconsider its decision upon a proper understanding of the law.

Last, review by this Court is merited, because the bench and bar will read the decision below to hold that a franchisor may voluntarily relinquish its right to a trademark and may then predicate its cancellation of a franchise upon the "loss of the franchisor's right to grant the right to use the trademark which is the subject of the

franchise." The bench and bar will not appreciate that the affirmance was based of an ill-stated, alternative rationale for termination of the franchise. Petitioner respectfully submits that the petition for writ should be granted to clarify that the primary rationale advanced by the Sixth Circuit for affirmance is without merit.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,
HAMOOD & FERGESTROM

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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

United States Court of Appeals,
Sixth Circuit.

PDV MIDWEST REFINING, L.L.C.; Citgo Petroleum Corporation, individually and as administrator of the Uno-Ven Marketer Agreements,
Plaintiffs/Counter Defendants-Appellees,
v.
ARMADA OIL AND GAS COMPANY; Allie Berry; Ali K. Jawad; Sam Haddas,
Defendants/Counter Plaintiffs-Appellants.

No. 00-2503.

Argued June 20, 2002.
Decided and Filed Sept. 5, 2002.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 97-72287--George E. Woods, District Judge.

ARGUED: Jamal J. Hamood, Troy, MI, for Appellant. Faith E. Gay, White & Case, Miami, FL, for Appellee. **ON BRIEF:** Jamal J. Hamood, Troy, MI, for Appellant. Faith E. Gay, White & Case, Miami, FL, for Appellee.

Before CLAY and GILMAN, Circuit Judges; HAYNES, District Judge. [FN*]

Before CLAY and GILMAN, Circuit Judges; HAYNES, District Judge. [FN*]

FN* The Honorable William J. Haynes, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

OPINION

CLAY, Circuit Judge.

Defendants Armada Oil & Gas Company, Inc. ("Armada"), Allie Berry, Ali K. Jawad, and Sam Haddas appeal the November 30, 2000 final judgment of the district court, after a bench trial, in favor of Plaintiffs, PDV Midwest Refining L.L.C. ("PDV-MR") and CITGO Petroleum Corporation ("CITGO"), on Defendants' counterclaim against Plaintiffs for violations of the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2801, *et seq.* Specifically, Defendants contend that the district court erred in granting summary judgment in favor of Plaintiffs as to whether, under the PMPA, Plaintiffs' voluntary loss and/or sale of a trademark that Defendants had been granted a right to use constituted a valid reason for termination of the franchise relationship between Armada and a now defunct subsidiary of Plaintiffs' parent

company. Defendants also contend that the district court erred in its legal analysis and factual findings pertaining to the subsequent bench trial on Defendants' PMPA claims. For the reasons that follow, we **AFFIRM** the judgment of the district court.

BACKGROUND

Procedural History

On May 14, 1997, Plaintiffs PDV-MR and CITGO filed a multi-count verified complaint against Defendants, alleging, among other things: (1) Plaintiffs had delivered goods for which they had not been compensated; (2) Quantum Meruit; (3) Breach of Guaranty Agreement (Against Jawad); (4) Anticipatory Breach of Contract; (5) Specific Performance; (6) Fraud; and (7) Recission of Transactions Induced by Fraud. Plaintiffs' claims stemmed from allegations that Defendants had obtained petroleum products from Plaintiffs and failed to pay for them. Defendants filed a countersuit alleging violations of the PMPA, and a claim of intentional interference with business expectancies and relationships against CITGO.

In their complaint, Defendants contended, *inter alia,* that the termination of the franchise relationship

between one of PDV-MR's parent company's subsidiaries, the "UNO-VEN" Company, and Armada was not based on any ground under which such termination would be permitted under the PMPA. Defendants also alleged that the real reason for the termination was because of UNO-VEN's withdrawal from the marketing of motor fuel in the relevant geographic market. Defendants further alleged that the withdrawal was a sham, and in any event violated the PMPA for other reasons.

UNO-VEN and Union Oil Company of California ("Unocal"), one of UNO-VEN's general partners, named as third-party defendants, had been parties in this action. However, the remaining parties stipulated to the dismissal of those two companies from this suit, and PDV-MR and CITGO agreed to assume any liability for violation of the PMPA on the part of either UNO-VEN or Unocal. [FN1]

> FN1. In this regard, to avoid confusion and for simplicity, the word "Plaintiffs," when used in this opinion, may refer to PDV ("Petroleos de Venezuela, S.A."), PDV-MR, CITGO, UNO-VEN and/or Unocal.

Plaintiffs moved for summary judgment on their claims, and on October 1, 1999, the district court granted partial summary judgment in favor of Plaintiffs on their

breach of contract and guaranty claims. The district court found that PDV-MR and CITGO were entitled to partial summary judgment as to $2,738,097.14, but that a material issue of fact existed as to another $574,098.93 to which Plaintiffs alleged that they were entitled. The district court also granted summary judgment in favor of CITGO on Defendants' interference with business expectancies and relationships counterclaim.

As for Defendants' PMPA counterclaim, the district court found that UNO- VEN had clearly stated its reasons for terminating its agreement with Armada as required by the PMPA. The district court recognized that at least one reason offered by UNO-VEN was that it had lost the right to use the Union 76 trademark. "Loss of a right to grant the right to use the trademark which is the subject of the franchise" is identified in the PMPA as a legitimate basis for franchise termination. *See* 15 U.S.C. § 2802(c)(6). Defendants contended, however, that this section does not apply where a franchisor's loss of the trademark can be categorized as "voluntary ." The district court rejected this argument based on the weight of authority that had addressed that issue. However, the district court also found that a disputed issue of material fact precluded summary judgment in Plaintiffs' favor as to Defendants' claim that

UNO-VEN's termination of the franchise relationship was based solely upon a withdrawal from a specific geographic market, as Defendants contended, or for the reasons cited by Plaintiffs, and whether termination of the franchise was made in good faith and in the ordinary course of business, as required by the PMPA. Further, the district court found that factual issues existed as to whether UNO-VEN had complied with the PMPA's notice provisions regarding termination of the franchise.

The parties entered into a settlement agreement on June 16, 2000. Pursuant to a stipulation entered into by the parties, final judgment in this action would be entered upon resolution of Defendants' counterclaim. *Id.* The dispute regarding the $574,098.93 was resolved pursuant to the settlement. Further, pursuant to the stipulation, the district court entered final judgment in favor of PDV-MR and CITGO in the amount of $3,015,387.12 plus interest on their breach of contract and guaranty claims.

The only issue remaining for trial was that part of Defendants' PMPA counterclaim that survived summary judgment. The district court conducted a bench trial on that claim from June 23, 2000 to July 10, 2000. On October 3, 2000, the district court filed its opinion, resolving all claims in favor of Plaintiffs, and entered final judgment in

Plaintiffs' favor on November 30, 2000. Defendants subsequently filed a timely notice of appeal.

Facts

PDV-MR and CITGO are subsidiaries of Petroleos de Venezuela, S.A. ("PDV"). PDV-MR and CITGO are Delaware corporations with their principal places of business in Tulsa, Oklahoma. UNO-VEN was an Illinois general partnership with its principal place of business in Illinois. Armada is a Michigan corporation with its principal place of business in Dearborn, Michigan. Armada is a distributor of petroleum products, primarily gasoline, some of which it distributes to independent retail gasoline stations under licensed brand names or trademarks of large oil and refining companies.

In 1989, PDV and Unocal entered into a joint venture to form UNO-VEN. PDV and Unocal became 50 percent owners of UNO-VEN from 1989 until the two parent companies decided to restructure UNO-VEN in the late 1990s. [FN2] Unocal brought marketing and a license to use the Union 76 trademark to the partnership, and PDV brought a fixed price crude oil supply agreement to the partnership. Pursuant to a trademark license agreement,

UNO-VEN acquired the right to use the trademarks of its parent company Unocal.

FN2. UNO-VEN was actually owned by subsidiaries of Unocal and PDV, Midwest 76, Inc., and VPHI Midwest, Inc., respectively.

In 1990, Armada entered into a contract with UNO-VEN to purchase Union 76 brand gasoline, which Armada then resold to independently owned gas stations. Armada became an UNO-VEN "jobber" which, as explained at trial, means essentially the same thing as marketer or distributor or franchisee. The agreement was renewed in 1995, and remained in effect throughout the relevant period of the UNO-VEN Armada relationship. The agreement between the parties provided that UNO-VEN could terminate or non-renew its agreement with Armada for any reason permitted under the PMPA. Defendants Berry, Jawad and Haddas executed a written contract ("the Guaranty") that provided that they would pay any indebtedness owed by Armada to UNO-VEN.

PDV-MR president Jerald Thompson testified at trial that from its inception, the Unocal PDV partnership was strained. The UNO-VEN deal had apparently been an economically disadvantageous endeavor for PDV. The crude oil supply agreement that PDV brought to the UNO-

VEN deal contained a fixed margin provision that resulted in PDV supplying UNO-VEN with crude oil at a price substantially below prevailing market prices. PDV had tried to buy out Unocal's share in UNO-VEN because of the economic drain on PDV, but Unocal wanted too much money. Finally, in or around 1996, Unocal decided to exit the "downstream" segment of the oil industry, which involves the refining and marketing segment of the industry. [FN3] Unocal's desire to exit the downstream segment of the market apparently led it to drop its asking price for its share of UNO-VEN, and resulted in Unocal and PDV entering into negotiations to restructure UNO-VEN.

FN3. At trial, Brian Connors, who served on UNO-VEN's executive committee on behalf of Unocal, explained the terms "downstream," "midstream" and "upstream." (J.A. at 997.) He testified that "[u]pstream is basically extracting oil, petroleum products from the ground. Downstream [involves the processes] from the refinery all the way to the marketplace, meaning refineries, terminals, marketing outlets. And midstream generally refers to pipelines." *Id.*

On December 26, 1996, PDV and Unocal entered

into a non-binding letter of intent ("LOI") regarding the restructuring of UNO-VEN. By its terms, the LOI was intended to provide a framework for continuing negotiations between the parties. It stated that the letter was "not intended to represent or constitute a binding agreement between, or commitment on the part of," either party, as "to the matters addressed" therein. PDV-MR President Thompson testified that during the first couple of months of 1997, CITGO became involved with the negotiations between PDV and Unocal, and during due diligence review, issues arose that threatened the deal, particularly issues surrounding environmental liability. Thompson testified that there was a three-to-four-week period in March 1997 when negotiations were suspended to allow the parties time "to consider their positions and have some whiff of a cooling-off period ." He testified that during that period both sides withdrew and there was concern that no deal would take place. However, the negotiations did resume.

As part of the proposed restructuring of UNO-VEN, PDV and Unocal took steps to ensure that their intended transaction would be in compliance with the PMPA. Stephen Bednar, CITGO's senior corporate counsel, testified at trial that he became involved with the UNO-

VEN restructuring and worked with an outside attorney to assist with the PMPA compliance issues.

During negotiations, PDV became aware that as part of its decision to exit the downstream segment of the industry, Unocal had sold its Union 76 trademark to another company, Tosco Corporation. The parties dispute as to exactly when Tosco purchased the trademark. According to Defendants, CITGO Representative Marty Sedlacek testified at his deposition that at some point in 1996, before PDV and Unocal executed the December 26, 1996 LOI, Unocal already had sold its rights to the Union 76 trademark to Tosco. At trial, Sedlacek testified that he had been mistaken earlier. There was also other evidence at trial that the Tosco deal took place in 1997.

The restructuring of UNO-VEN was completed on April 11, 1997, pursuant to the Partnership Interest Retirement Agreement ("PIRA"). PDV acquired Unocal's 50 percent interest in UNO-VEN. PDV-MR agreed to pay approximately $250 million to Unocal to acquire substantially all of UNO-VEN's marketing and refining assets. The PIRA provided that PDV-MR could designate a party to administer UNO-VEN's franchise agreements (such as the one UNO-VEN had with Defendant Armada). PDV- MR designated CITGO to oversee this

administration. The April 11, 1997 agreement also entitled PDV-MR to use the Union 76 trademark for the 12-month period after the closing date of the transaction.

CITGO sent a letter to all UNO-VEN distributors, including Armada, dated April 18, 1997, which provided initial notice of the UNO-VEN/PDV-MR contract reached on April 11, 1997. That letter stated that after UNO-VEN's refining and marketing assets were transferred to PDV-MR, "there will be a twelve (12) month transition period during which CITGO has agreed to supply [Union 76] branded petroleum products to [Armada]." During this transition period, [Armada] will be able to continue to use the [Union 76] marks, and accept the Union 76 credit card. During this transition period, [Armada's] UNO-VEN agreements will continue in place and be administered by CITGO." (J.A. at 604, ¶ 15.)

On April 30, 1997, UNO-VEN sent all Union 76-branded franchisees, including Armada, written notification of termination of the franchise relationship by certified mail, as required by the PMPA. This notification expressly stated that UNO-VEN terminates and/or non-renews the sales agreement and any franchise relationship, effective May 1, 1998. Armada received a second letter from UNO-VEN on April 30, 1997 as well, essentially providing the

same information regarding the sale of all of UNO-VEN's assets to PDV; however, that letter pertained only to unbranded gasoline and not Union 76-brand gasoline. The letter pertaining to unbranded gasoline did not discuss the PMPA because unbranded contracts are not subject to the requirements of the PMPA.

On May 1, 1997, the UNO-VEN restructuring closed and CITGO began operating the former UNO-VEN assets, supplying Union 76-brand gasoline to UNO-VEN's franchisees. Between April 14 and May 6, 1997, Armada took over $3 million worth of Union 76-brand gasoline from UNO-VEN and CITGO and refused to pay for it. Armada's conduct in that regard formed the basis for Plaintiffs' lawsuit. On May 1, 1998, Armada's franchise with UNO-VEN was terminated as set forth in the April 30, 1997 notice of termination.

DISCUSSION

I.

This Court reviews a district court's order granting summary judgment *de novo. Johnson v. Univ. of Cincinnati,* 215 F.3d 561, 572 (6th Cir.2000). Summary judgment is appropriate where there is no genuine issue as

to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The Court must view the evidence and draw all reasonable inferences therefrom in a light most favorable to the non-moving party. *Williams v. Int'l Paper Co.*, 227 F.3d 706, 710 (6th Cir.2000). However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

After a bench trial, the district court's findings of fact will be set aside only for clear error. *See Burzynski v. Cohen*, 264 F.3d 611, 616 (6th Cir.2001); *AM Intern., Inc. v. Int'l Forging Equip. Corp.*, 982 F.2d 989, 998 (6th Cir.1993); Fed.R.Civ.P. 52(a). "This standard does not entitle a reviewing court to reverse a district court's findings of fact because the reviewing court is convinced it would have decided the case differently." *Equal Employment Opportunity Comm'n v. Yenkin-Majestic Paint Corp* ., 112 F.3d 831, 833 (6th Cir.1996). Further, where there are two permissible ways to view the evidence, the district court's decision to view the evidence in one of those ways as opposed to the other cannot be clear error. *Id.* (citing *Anderson v. City of Bessemer City, N.C.*, 470 U.S.

564, 573-74 (1985)). The district court's conclusions of law, however, are reviewed *de novo. Burzynski,* 264 F.3d at 616.

II.

Defendants assert several arguments on appeal. Defendants challenge the district court's grant of summary judgment in Plaintiffs' favor as to Defendants' counterclaim under the PMPA. Specifically, they argue that the district court wrongly determined that a voluntary loss of a trademark can serve as a valid means of terminating a franchise relationship under the PMPA. Defendants also contend that the district court erred, after the bench trial, in ruling that Plaintiffs had presented valid bases for terminating the franchise under the PMPA and otherwise followed proper procedures under the PMPA in terminating the franchise. For instance, Defendants argue that even assuming that a voluntary loss of a trademark is a sufficient basis to terminate a franchise relationship, the district court erred in finding as a factual matter that Unocal's sale of its trademark rights to Tosco occurred on March 31, 1997, such that notice to Armada on April 30, 1997 that Plaintiffs were terminating the franchise was timely under the

PMPA. Further, Defendants argue that Plaintiffs' "real" reason for terminating the franchise with Armada was UNO-VEN's withdrawal from the relevant geographic market area, and that where withdrawal from a geographic market is the reason that a franchisor relies upon to end a franchise under the PMPA, the franchisor must follow certain procedures that were not followed in this case. Below, after a brief discussion of the PMPA and some of the policies underlying the implementation of that act relevant to this appeal, we will address Defendants' arguments in turn.

A. The PMPA

Congress enacted the PMPA in 1978 to create a uniform set of rules covering the grounds for termination and non-renewal of motor fuel marketing franchises, and "to protect 'franchisees from arbitrary or discriminatory termination or non-renewal of their franchises.' " *Massey v. Exxon Corp.*, 942 F.2d 340, 342 (6th Cir.1991) (citing *Brach v. Amoco Oil Co.*, 677 F.2d 1213, 1216 (7th Cir.1982) (citing S.Rep. No. 731, 95th Cong.2d Sess. 15, *reprinted in* 1978 U.S.Code & Cong. & Admin. News 873, 874)). Congress enacted the PMPA to allay three specific

concerns: "[1] that franchisee independence may be undermined by the use of actual or threatened termination or nonrenewal to compel compliance with franchisor marketing policies; [2] that gross disparity of bargaining power may result in franchise agreements that amount to contracts of adhesion; and [3] that termination or nonrenewal may disrupt the reasonable expectations of the parties that the franchise relationship will be a continuing one." *Massey,* 942 F .2d at 343 (citation omitted). The "[m]ost important ... thing the [PMPA] is intended to prevent is the appropriation of hard-earned good will that occurs when a franchisor arbitrarily takes over a business that the franchisee has turned into a successful going concern." *Thompson v. Amoco Oil Co.,* 903 F.2d 1118, 1119 (7th Cir.1990) (quoting *Brach,* 677 F.2d at 1220). Consistent with congressional intent, this Court "must grant the PMPA a liberal construction consistent with its overriding purpose to protect franchisees." *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.,* 869 F.2d 917, 921 (6th Cir.1989) (citation and internal quotation marks omitted). To that end, "[t]he PMPA prohibits termination of any franchise agreement or non-renewal of any franchise relationship except on the basis of specifically enumerated grounds and upon compliance with certain notification

requirements." *Massey,* 942 F.2d at 343.

This Court has recognized, however, that in adopting the PMPA, Congress struck "an explicit statutory balance between the interest of franchisees in freedom from arbitrary and discriminatory franchise terminations and the interest of franchisors in freedom to transfer motor fuel marketing assets in response to changing marketing conditions." *May-Som,* 869 F.2d at 921. Thus, "although Congress ... intended strong protection of the interest of franchisees[,] ... in an age of increasing corporate competition, the major petroleum firms must retain the freedom to seek greater economic efficiency through corporate reorganizations, mergers and acquisitions." *Id.; see also Meghani v. Shell Oil Co.,* 115 F.Supp.2d 747, 751-52 (S.D.Tex.2000), *aff'd mem.,* 273 F.3d 1098 (5th Cir.2001) (citing *May-Som* approvingly for this proposition).

A franchisee may bring a civil action regardless of the amount in controversy if the franchisor fails to comply with the termination requirements set forth in 15 U.S.C. § § 2802 or 2803 of the PMPA. *See* 15 U.S.C. § 2805(a). "[T]he franchisee [has] the burden of proving the termination of the franchise ...." § 2805(c). In the instant case, there is no question that Plaintiffs terminated the

franchise. Thus, the burden then falls on Plaintiffs (as franchisor) "to produce evidence to establish as an affirmative defense that such termination ... was permitted under section 2802(b) ...." *Id.; Brach,* 677 F.2d at 1219.

With regard to the termination of franchises, § 2802(a) of the PMPA provides:

> Except as provided in subsection (b) of this section ..., no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may ... (1) terminate any franchise ... prior to the conclusion of the term, or the expiration date, stated in the franchise; or (2) fail to renew any franchise relationship ....

15 U.S.C. § 2802(a)(1)(2).

Subsection (b) of § 2802 delineates some of the grounds for termination or non-renewal of a franchise relationship. That subsection states in pertinent part that a franchisor may terminate or fail to renew such a relationship if the following transpires:

> The occurrence of *an event which is relevant to the franchise relationship* and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge

of such occurrence ... (i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given ....

15 U.S.C. § 2802(b)(2)(C)(i) (emphasis added).

Further, subsection 2802(c) lists 12 examples of events relevant to the franchise relationship that may form a proper basis for termination. That subsection provides in pertinent part:

As used in subsection (b)(2)(C) of [§ 2802], "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as

...

(6) loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise, unless such loss was due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence of the franchisor, is related to action taken in bad faith by the franchisor.

15 U.S.C. § 2802(c), (c)(6).

Although there are 12 specific grounds outlined under § 2802(c) upon which termination or non-renewal is

proper, the statute itself makes clear that this list is not exclusive, but merely illustrative. *See* 15 U.S.C. § 2802(c) (explaining that the events referred to in subsection (b)(2)(C) as being proper for termination or non-renewal "includes" those listed in subsection (c)); *Russo v. Texaco, Inc.*, 808 F.2d 221, 225 (2d Cir.1986). Legislative history supports this view. *See* 95th Cong., 2d Sess. 38, *reprinted in* 1978 U.S.Code Cong. & Admin. News 873, 896 ("The enumerated list is not exclusive."). Congress delegated to the courts the discretion to determine what events, other than those enumerated, constitute an event which is relevant to the franchise relationship as a result of which termination or non-renewal is reasonable. *Brach*, 677 F.2d at 1219 (explaining that Congress delegated to the courts the task of interpreting the scope of § 2802(b)(2)(C)).

Courts must carefully scrutinize the reasonableness of terminations whether or not the terminating event is specifically enumerated in § 2802(c). *Marathon Petroleum Co. v. Pendleton*, 889 F.2d 1509, 1512 (6th Cir.1989) (citing *Darling v. Motor Oil Corp.*, 864 F.2d 981, 990 (2d Cir.1989)). "[T]he grounds specified as justification for termination or nonrenewal of a franchise are intentionally broad enough to provide to franchisors the flexibility which may be needed to respond to changing market conditions ...

[but] not so broad as to deny franchisees meaningful protections from ... discriminatory terminations ...." *Brach,* 677 F .2d at 1220 (citations and internal quotation marks omitted).

A franchisor needs to provide only one valid reason for termination under the PMPA. *See Thompson,* 903 F.2d at 1120 (explaining that where franchisor offered franchisee two reasons for termination, only one needed to be valid in order to justify termination under the PMPA). Thus, notice of a legitimate ground for termination is not made ineffective by defective notice for additional grounds for termination. *See Stuart v. Exxon Co., U.S.A.,* 624 F.Supp. 648, 653-54 (N.D.Tex.1985). With that backdrop in mind, we turn to the various arguments raised in this appeal.

B. Whether voluntary loss of a trademark may justify termination under the PMPA

On April 30, 1997, UNO-VEN sent its franchisees official notice of termination. That letter stated:

> On April 11, 1997, the owners of the UNO-VEN Company ("UNO-VEN") entered into a definitive agreement for the distribution of the refining and

marketing assets of the company to an indirect wholly-owned subsidiary of Petroleos de Venezuela, S.A; which will become the owner of those assets. The transaction is scheduled to close on May 1, 1997. Because Unocal will no longer have an interest in the refining and marketing assets, UNO-VEN's right to use the Unocal and 76 trademarks and credit card will be terminated. UNO-VEN's general offices will be closed following completion of the transaction and its employees will be separated from the company. UNO-VEN will cease to operate as an on-going refining and marketing company.

The asset purchaser has designated its affiliate CITGO Petroleum Corporation ("CITGO") to administer the orderly termination of UNO-VEN's contracts with customers. A termination notice period of one year after the closing of the transaction for continued use of the Unocal and 76 trademarks and credit card was negotiated as part of the transaction. CITGO will continue Unocal and 76 branded supply under your current agreements for the one year period following closing of the transaction. You will be contacted by a CITGO representative concerning ongoing operation of your marketership during the one year termination notice period.

Please refer to your Marketer Sales Agreement dated

1/1/95. As a consequence of the transaction described above, and as a result of the termination of UNO- VEN's right to use the Unocal and 76 trademarks and credit card, UNO-VEN hereby terminates and/or non-renews said Marketer Sales Agreement and does hereby terminate and/or non-renew any franchise relationship, effective as of May 1, 1998, one year from today's date. All agreements relating to the Marketer Sales Agreement are also hereby terminated and non-renewed as of the effective date, May 1, 1998.

In compliance with the provisions of the Petroleum Marketing Act, you are hereby notified that the grounds for the above action are that:

1. An event has occurred which is relevant to the franchise relationship and as a result of which termination of the franchise and non-renewal of the franchise relationship is reasonable.

2. UNO-VEN has lost the right to grant the use of the trademark which is the subject of the franchise.

This Termination and non-renewal notice affects your marketer relationship with UNO-VEN only. You may be required to send notices of termination or non- renewal under the provisions of the Petroleum Marketing Practices Act to franchisees of your company, if any. It is

your responsibility to determine the need for and method for compliance with any obligations you may have to your franchisees under the Act. UNO-VEN will not be sending any notices to your customers as no franchise relationship exists between UNO-VEN and its marketers' customers.

In accordance with the requirements of the Petroleum Marketing and Practices Act, enclosed herewith is a copy of the summary of the provisions of Title I of said Act as published by the United States Department of Energy.

....

Sincerely,

The UNO-VEN Company

(J.A. at 1425-26.)

Defendants first argue that the district court erred in granting summary judgment on the ground that Unocal's sale of its trademark constituted a "loss of the franchisor's right to grant the right to use the trademark," as defined in the PMPA. *See* 15 U.S.C. § 2802(c)(6).

In *Russo,* 808 F.2d 221, the Second Circuit squarely addressed this issue. In that case, the appellants claimed that Texaco, Inc. violated the PMPA when it terminated their franchises. *Id.* at 222. Texaco decided to purchase

certain assets of Getty Oil Company. *Id.* at 223. Because of the size of the purchase, Texaco realized that it might face antitrust violations if it did not divest certain assets it had acquired. Therefore, Texaco agreed to sell to Power Test most of Getty's gasoline station assets and supply contracts, among other things, but Texaco was to have retained ownership of the "Getty" trademark. *Id.* However, the Federal Trade Commission ("FTC") intervened in the Texaco Getty transaction, as the agency believed that " '[c]ontrol by Texaco of Getty's marketing operations is likely to reduce price competition in the gasoline and middle distillate marketing provided by Getty ....' " *Id.* A final consent order required that Texaco divest in good faith its ownership of the Getty brand name and trademark. *Id.* at 224. On March 4, 1985, Texaco informed Getty dealers (the appellants in that action) that their franchise relationships would be terminated pursuant to 15 U.S.C. § 2802(b)(2)(C) of the PMPA. *Id.* Texaco asserted that the termination was based on the fact that it had lost the right to grant the use of the trademark that was the subject of the franchise. *Id.* (citing § 2802(c)(6)). The appellants responded by arguing, among other things, that the word "loss" in § 2802(c)(6) "implies an involuntary loss of the right to grant the right to use a trademark and that Texaco's

divestment of the 'Getty' trademark was voluntary." *Id.* at 226. The Second Circuit rejected this argument. It found that "loss" as used in § 2802(c) intends to cover voluntary and involuntary situations. *Id.* at 227. It looked to the PMPA's legislative history as well as to decisions from other circuits to reach its holding. *Id.*

The court first noted that the word "loss" appears twice in § 2802(c), in § 2802(c)(4) (involving the franchisor's loss of the right to grant the franchisee use of the leased marketing premises) and § 2802(c)(6) (loss of a trademark). The Second Circuit noted that although the legislative history of the PMPA does not indicate the precise meaning of the expression "loss" as it relates to loss of a trademark under § 2802(c)(6), the legislative history "makes clear that where a franchisor's voluntary decision not to renew an underlying lease results in the 'loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease,' termination is nevertheless reasonable under § 2802(b)(2)(C)." *Id.* (citing Senate Report at 38, *reprinted in* 1978 U.S.Code Cong. & Admin. News at 896)). The court also pointed out that other circuits interpreting § 2802(c)(4) have construed "loss" to include a voluntary loss. *Id.* (citing *Lugar v. Texaco, Inc.*, 755 F.2d 53, 56 (3d

Cir.1985); *Veracka v. Shell Oil Co.*, 655 F.2d 445, 448 (1st Cir.1981)). Relying on the doctrine of *in pari materia,* the Second Circuit held that there was no reason to treat the word "loss" differently inasmuch as it appears twice in the same section of the statute. *Id.* The Second Circuit explained that "[i]t is a settled principle of statutory construction that '[w]hen the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place.' " *Russo,* 808 F.2d at 227 (citing *United States v. Nunez,* 573 F.2d 769, 771 (2d Cir.), *cert. denied,* 436 U.S. 930 (1978) (quoting *Meyer v. United States,* 175 F.2d 45, 47 (2d Cir.1949)).

Defendants urge this Court to reject the reasoning of *Russo* on several grounds, none of which we find persuasive. Defendants contend that the Second Circuit's lengthy discussion as to whether "loss" under § 2802(c)(6) can be voluntary was merely dictum, inasmuch as the court ultimately determined that because the FTC required Texaco to divest the Getty trademark, the loss of the trademark was involuntary. "Strictly speaking an obiter dictum is a remark made or opinion expressed by a judge, in his decision upon a cause, by the way—that is, incidentally or collaterally, and not directly upon the

question before the court ...." Blacks Law Dictionary, 1100 (7th ed.1999) (citation and internal quotation marks omitted). Although dictum is unnecessary to the decision, it may nevertheless be followed if "sufficiently persuasive." *Central Green Co. v. United States,* 531 U.S. 425, 431 (2001) (quoting *Humphrey's Ex'r v. United States,* 295 U.S. 602, 627 (1935)); *see also* Black's at 1100 (although lacking precedential value, dicta "may be considered persuasive"). Even assuming that the Second Circuit's lengthy discussion regarding whether the voluntary loss of a trademark could be considered a loss under § 2802(c)(6) was dictum, we find that court's analysis of the issue well-reasoned and persuasive. *Id.*

Defendants next argue that the legislative history cited by the Second Circuit involved situations in which the underlying leases expired under their own terms and the franchisors made voluntary determinations not to renew those leases. Defendants contend that *Russo* cited no authority for the proposition that a franchisor can terminate an "unexpired" lease and use it as the basis for ending the franchise under the PMPA, such as occurred in this case with the trademark. Defendants essentially contend that *Russo* reached the wrong result because § 2802(c)(4) involves "expiration of an underlying lease," which by its

terms *can* expire, which is different than the loss of a trademark, which may be held in perpetuity or for a long period of time.

While Defendants may be correct that the Second Circuit cited cases involving situations where the leases were going to expire on their own terms and the franchisors decided not to renew them, this does not mean that the authority relied on by the Second Circuit did not support that court's conclusion that a franchisor's decision to terminate or non-renew a lease can be either voluntary or involuntary. In one of the cases relied on by the court in *Russo, Veracka,* 655 F.2d 445, the franchisee contended that the franchisor had violated 15 U.S.C. § 2802(c)(4) of the PMPA when it elected to take affirmative steps to terminate a lease agreement that otherwise would have automatically been extended for another year, per the agreement's terms. *Id.* at 446-47. The First Circuit rejected the franchisee's argument that loss of a lease for purposes of terminating a franchise under the PMPA can occur only where such loss is "outside the control of the franchisor." *Id.* at 447. In the instant case, Defendants make an argument similar to that made by the franchisee and rejected by the court in *Veracka,* that "loss" as used in the PMPA was intended to apply only in situations where the

loss was involuntary or the result of an occurrence outside of the control of the franchisor, and not, as here, where the loss might be considered voluntary.

After *Russo* was decided, the Eleventh Circuit also held that 15 U.S.C. § 2802(c)(4) "encompasses a franchisor's voluntary relinquishment of its lease." *Hutchens v. Eli Roberts Oil Co.*, 838 F.2d 1138, 1141 (11th Cir.1988). The Eleventh Circuit relied on such cases as *Veracka* and *Lugar*, both of which were relied on by the *Russo* court. Particularly, *Hutchens* noted that the court in *Veracka* had pointed out that § 2802(c)(4) does not make reference to the cause of the underlying lease's termination, and legislative history suggests that Congress intended to include voluntary terminations to be within the scope of § 2802(c)(4). *Id*.

According to the Senate Report:

Expiration of the underlying lease could occur under a variety of circumstances including, for example, a decision by the franchisor not to exercise an option to renew the underlying lease. However, it is not intended that *termination* or *non-renewal* should be permitted based upon the expiration of a lease which does not evidence the existence of an arms length relationship between the parties and as a result of expiration of which

no substantive change in control of the premises results. *Id.* (citing S.Rep. No. 731, 95th Cong., 2d Sess. 38, *reprinted in* 1978 U.S.Code Cong. & Admin. News 873, 896) (emphasis added).

The Eleventh Circuit held that "in deciding whether the termination of a franchisor's underlying lease falls within section 2802(c)(4) the cause of the lease's termination is not determinative. Rather, we must be satisfied that the termination represents an arms length transaction ...." *Id.* at 1141-42 (citing *Hifai v. Shell Oil Co.*, 704 F.2d 1425, 1429 (9th Cir.1983); *Veracka,* 655 F.2d at 448). Thus, "[a]s long as the franchisor's decision to relinquish its lease is an arms length transaction in which it actually gives up control over the premises, it makes no difference whether the relinquishment is accomplished through *cancellation* of the lease or a decision not to renew it." *Id.* at 1142 n. 1 (emphasis added).

We believe that the district court did not err in finding that a loss of a trademark can be voluntary under the PMPA. *See Russo,* 808 F.2d at 227. As the Second Circuit noted, while there is no text in the legislative history regarding whether "loss" of a trademark under § 2802(c)(6) may be voluntary as it pertains to a legitimate reason to terminate a franchise under § 2802(b)(2)(C),

legislative history and the weight of judicial authority regarding "loss" of a lease under § 2802(c)(4) indicates that the loss under that provision may be voluntary or involuntary. *Russo,* 808 F.2d at 227; *Hutchens,* 838 F.2d at 1142 n. 1. Reading the word "loss" in the two subsections *in pari materia,* there is no reason why the same meaning should not be attributed to the word in both places. *United States v. Stauffer Chem. Co.,* 684 F.2d 1174, 1184 (6th Cir.1982) (holding that "[i]n interpreting the meaning of one provision of an act it is proper that all other provisions *in pari materia* also be considered"). In *Stauffer,* this Court reasoned that since the term "representative" appeared in two sections of the Clean Air Act that both dealt with inspections by the Environmental Protection Agency, and the meaning of the term was clear as to one of the sections, the term should be construed consistently in both sections. *Id.* at 1184. Such reasoning favors finding that the district court in the instant case did not err inasmuch as the word "loss" appears in § 2802(c) twice, and that section deals exclusively with events that are relevant to the franchise relationship and as a result of which termination or non-renewal of the franchise relationship is reasonable. Because the loss of a lease may be voluntary, so too may the loss of a trademark. *Id.*

Plaintiffs also point out that if Congress intended to ascribe different meanings to the word "loss" in the two subparts of the same section, it could have done so expressly when it amended the PMPA in 1994.[FN4] Further, when it amended the statute, which was well after *Russo* was decided, Congress could have made clear that "loss" of a trademark cannot be voluntary, as through a sale of the trademarks or other assets including the trademarks, but instead must be involuntary. Congress, however, did not do so. As the Supreme Court has held, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons,* 434 U.S. 575, 580- 81 (1978).

FN4. *See* Pub.L. No. 103-371, § 3, § 102(c)(4), 108 Stat. 3484 (codified at 15 U.S.C. § 2802(c)(4)(B) (West Supp.1996) (amending portions of PMPA pertaining to leases).

Defendants further contend that whether voluntary or involuntary, the franchisor's right to grant the right to use a trademark cannot serve as a basis for the termination of a franchise where the loss the trademark resulted from the fault or negligence and occurred as a result of bad faith on the part of the franchisor. Defendants contend that a fact

question exists as to whether divestiture of the trademark rights in the present case was undertaken in good faith or merely taken to avoid the PMPA requirements. Defendants obviously rely on language in § 2802(c)(6), which provides that the loss of the right to grant the right to use the trademark is a legitimate reason to terminate a franchise provided that such loss is not "due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor." 15 U.S.C. § 2802(c)(6). Defendants contend that where the loss of the trademark was in bad faith, such as through a sham business transaction, then § 2802(c)(6) may not serve as a valid means of termination under the PMPA.

While the district court concluded that loss of the trademark may be voluntary when deciding Plaintiffs' motion for summary judgment, the district court nevertheless found that summary judgment was inappropriate as to when Plaintiffs acquired knowledge that they were to lose the trademark, which, as explained below, was important for purposes of insuring that Plaintiffs had complied with PMPA notice requirements. Similarly, the district court found that factual issues existed as to whether

Plaintiffs' termination of the franchise was based on the reasons they advanced (loss of the trademark and the reorganization of UNO-VEN) or premised on the reason Defendants claimed, a decision on Plaintiffs' part to withdraw from the geographic market. Thus, those issues were not resolved until after trial.

C. Reasons Offered for Termination

Defendants contend that even if loss of the trademarks was a valid reason for termination, Plaintiffs failed to comply with PMPA notice requirements regarding that specific reason for termination of the franchise relationship. Defendants also appear to argue that loss of the trademarks was in bad faith and the result of a sham business transaction undertaken so that Plaintiffs could avoid dealing with their franchisees under the PMPA. Defendants further contend that the district court clearly erred in concluding that Plaintiffs did not withdraw from the relevant geographic market. They contend that Plaintiffs' stated reasons for termination (restructuring and loss of the trademarks) are pretextual, and what really occurred was a withdrawal from the geographic market, which involves extra requirements in order that termination

is proper under the PMPA, and that such requirements were not met here.

Plaintiffs argue that they provided Defendants with two valid reasons for their termination of the franchise, neither being withdrawal from the relevant market, and neither of which is pretext for what was really a withdrawal from the relevant market. Plaintiffs contend that their decision to end the franchise must stand or fall on at least one valid reason, and, more importantly, on the reasons for termination that they actually provided to Defendants.

As previously stated, the April 30 termination letter set forth two grounds for the termination: (1) that an event had occurred which is relevant to the franchise relationship and as a result of which termination of the franchise and non-renewal of the franchise relationship is reasonable, and (2) that UNO VEN had lost the right to grant the use of the trademark which is the subject of the franchise.[FN5]

FN5. Defendants vehemently argue for the first time in their reply brief that the two purported reasons for termination really only constitute a single reason: loss of the trademarks. They contend that the April 30, 1997 letter specifically stated that "[b]ecause Unocal will no longer have an interest in refining and marketing assets, UNO-VEN's right to

use the Unocal and 76 trademarks and credit card will be terminated." (J.A. at 1425.) Defendants argue that this language and no other language in the letter was specific enough to apprise them that Plaintiffs were asserting two reasons for the termination. *See e.g., Svela v. Union Oil Co. of Calif.,* 807 F.2d 1494, 1498 (9th Cir.1987) (explaining that the reason for non-renewal must be specific enough for the franchisee to determine whether the non-renewal is based on a lawful ground). In any event, Defendants are mistaken. The April 30, 1997 letter stated that as a result of the transfer of assets to PDV, UNO-VEN will close its doors and its "employees will be separated from the company." (J.A. at 1425.) The letter further provided that "UNO-VEN will cease to operate as an ongoing refining and marketing company." *Id.* The letter also clearly stated that "[a]s a consequence of the transaction described above, *and* as a result of the termination of UNO- VEN's rights to use the Unocal and 76 trademarks and credit card," UNO-VEN terminates the franchise relationship. *Id.* (emphasis added). Therefore, two distinct reasons were given for the termination.

Pursuant to 15 U.S.C. § 2802(b)(2)(C), in order for notice of an event listed under § 2802(c) (such as notice regarding loss of a trademark) to be timely, the franchiser could not have acquired actual or constructive knowledge of the event that triggered the termination more than 120 days prior to the date on which notification of the termination was given. *Id.* Defendants contend that even if the loss of the trademark was the true reason for Armada's termination, it would not be a valid reason unless Unocal or UNO-VEN had actual or constructive knowledge of the loss of the trademark no more than 120 days before the official termination notice was issued on April 30, 1997. Defendants contend that Plaintiffs failed to meet their burden of showing that the Unocal sale of its trademark to Tosco occurred in March 1997, as the district court found. Defendants point out that Marty Sedlacek at his deposition stated that the trademark rights at issue were sold to Tosco months before the Letter of Intent was entered into on December 26, 1996. Further, Defendants point out that Thompson testified that PDV-MR's procuring the Union 76 logo was not discussed during any of the negotiations to which he was a party. However, Thompson never testified, as Defendants appear to contend, that Unocal had sold the Union 76 trademark or that he knew that Unocal had sold

the trademark when the LOI was executed in December 1996. He testified that it was revealed at some point during the negotiation sessions that Unocal was in negotiations with Tosco to buy Unocal's West Coast refining marketing assets, and that PDV-MR found out about the sale sometime in March 1997.

The district court found as a matter of fact that on March 31, 1997, Unocal sold to Tosco the Union 76 trademarks along with all of Unocal's West Coast refining and marketing assets. We, of course, do not review this factual finding *de novo,* but rather for clear error. *Burzynski,* 264 F.3d at 616. The district court pointed out that PDV-MR's Thompson, CITGO Senior Corporate Counsel Bednar, and Unocal Representative Brian Conners all provided consistent testimony concerning the timing of the Tosco/Unocal transaction. Further, the district court found persuasive another published opinion that referenced the Tosco/Unocal transaction. *See Unified Dealer Group v. Tosco Corp.,* 16 F.Supp.2d 1137, 1139 (N.D.Cal.1998) ("On March 31, 1997, Tosco purchased from the Union Oil Company of California ('Union') the 76 Products Company which included approximately 900 service stations in California. Tosco also acquired the exclusive right to use the 'Union 76' and '76' trademarks in perpetuity.")

Plaintiffs, as did the district court, point out that despite Sedlacek's deposition testimony, which he later claimed was wrong, Thompson, Bednar, and Conners each testified that Unocal sold the trademark rights to Tosco in March 1997, well within 120 days of when Defendants received their notice of termination and before the April 11, 1997 PIRA--which represented the agreement between PDV and Unocal regarding UNO-VEN. In light of this evidence, we conclude that the district court did not clearly err in finding that the sale of the Union 76 trademarks closed on March 31, 1997, and at that time, Plaintiffs acquired knowledge of the loss of the trademarks. *See Burzynski,* 264 F.3d at 616; *see also* 15 U.S.C. § 2802(b)(2)(C)(i). [FN6]

> FN6. During oral argument, Defendants pointed to an unpublished district court opinion, involving a case in which Plaintiffs in the instant case were parties. *See Draeger Oil Co. v. UNO-VEN,* No. 99-C-317 (E.D. Wis Mar. 27, 2002) (granting motion for summary judgment in favor of PDV, Unocal and others as to franchisees' claims that the termination of the franchise relationships in that case violated the PMPA). In *Draeger,* the district court found that as of December 14, 1996, Unocal and Tosco executed an agreement that transferred Unocal's

trademarks, including the Union 76 trademark, to Tosco, subject to the rights of UNO-VEN. *Id.* at * 6-*7. Defendants urge that we rely on that court's finding to conclude that the district court in this case erred in finding that the transfer of the trademarks occurred on March 31, 1997. However, *Draeger* does not explain the exact terms of the Unocal Tosco agreement with respect to the trademarks, but provides that an agreement regarding the trademarks had been executed in 1996, subject to UNO-VEN's rights. Further, for their part, Plaintiffs point to another unpublished district court opinion which found that the Tosco-Unocal deal closed on March 31, 1997. *See Barman v. Union Oil Co.*, No. CIV. 97-563-AS, 2000 WL 13350555, at *2 (D.Ore.2000). Considering the conflicting authority from other courts and the evidence before the district court in this case, including consistent testimony at trial that Unocal transferred its trademark rights to Tosco in March 1997, we believe that the district court did not clearly err in finding that the trademarks were transferred on that date. *See* Fed.R.Civ.P. 52(a) ("Findings of fact, whether based on oral or

documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.").

The district court found that termination was proper, pursuant to 15 U.S.C. § 2802(b)(2)(C), as a result of the UNO VEN restructuring, and pursuant to § 2802(c)(6), as a result of the loss of the trademarks. The district court acknowledged that the reasons provided by Plaintiffs regarding the termination were related, but the court analyzed them separately.

As for the restructuring, the district court explained that under the PIRA, UNO-VEN's internal structure changed drastically. Unocal sold its 50 percent ownership to PDV, and the latter then assumed all of UNO-VEN's assets. UNO- VEN's trademark was terminated, although UNO-VEN distributors were allowed to continue using the Union 76 trademarks until May 1998. We agree with the district court that the restructuring is an event that alone constituted a sufficient basis to terminate the franchise; however, we also conclude that we need not consider the loss of the trademark and the restructuring as separate events. The factual situation in this case is that both events occurred, are clearly related, and that as such, both events

combined create a valid reason for the termination.

The restructuring is not an *event* enumerated as a ground for termination under § 2802(c). Under this circuit's jurisprudence, even where the relevant event that occurs is enumerated under 15 U.S .C. § 2802(c), this Court must still "scrutinize the reasonableness of the termination." *Marathon,* 889 F.2d at 1512. ***But see Russo,*** 808 F.2d at 225 ("Once having ascertained that an event is encompassed by one of the twelve enumerated events, a court need make no further inquiry as to the reasonableness of the termination.") (citing *Lugar,* 755 F.2d at 59). The district court scrutinized the reasonableness of the termination in the instant case to determine whether it was made in good faith and in the normal course of business. *See e.g., Brach,* 677 F.2d at 1223. When considering whether a non-enumerated event constitutes a permissible basis for termination, courts generally determine whether one of the enumerated events is similar to an event actually listed under the Act. *Brach,* 677 F.2d at 1219 (explaining that courts do not have *carte blanche* to define the parameters of § 2802(b)(2)(C) and that the enumerated list under § 2802(c) "was intended as a guide for the courts").

As explained above, § 2802(c)(6) explicitly states that loss of a trademark constitutes a permissible ground for

termination. However, there are other sections under § 2802(c) that "involve situations where the occurrence of the event disables the franchisor from providing an essential element of the franchise [such as] 'loss of a franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease;' [or] 'condemnation ... of the leased premises' ...." *Russo v. Texaco, Inc.*, 630 F.Supp. 682, 688 (E.D.N.Y.1986) (citations omitted). As the district court in *Russo* noted, these events suggest a sort of "involuntary loss of the right to franchise by the franchisor." *Id.* Whether the event that triggered the decision to terminate can be characterized as voluntary or involuntary, however, is not dispositive, as it is the reasonableness of the decision to terminate that is critical. § 2802(c); *Russo,* 630 F.Supp at 688 ("Involuntariness is not ... the *sine qua non* of reasonableness."). Further, as this Court has stated, although the PMPA's purpose is to regulate coercive relationships between franchisors and franchisees, and to protect franchisees from discriminatory and arbitrary practices, the PMPA struck a balance between those goals and "the interests of franchisors in freedom to transfer motor fuel marketing assets in response to changing marketing conditions." *May-Som,* 869 F.2d at 921. This

Court explained that the PMPA "constituted a diminution of the property rights of franchisors and thus should not be interpreted to reach beyond its original language and purpose." *Id.* (citing *Checkrite Petroleum, Inc. v. Amoco Oil Co.*, 678 F.2d 5, 8 (2d Cir.), *cert denied*, 459 U.S. 833 (1982)).

Further, this Court has noted that in balancing the competing interests of the PMPA "in an age of increasing corporate competition, the major petroleum firms must retain the freedom to seek greater economic efficiency through corporate reorganizations, mergers and acquisitions." *May-Som*, 869 F.2d at 921. This Court also explained:

> There is nothing in the language of the [PMPA] suggesting that a major national acquisition and large scale divestiture for bona fide business reasons was intended to be stymied by the right of individual franchisees to insist on a prior relationship on exactly its former terms. A permanent status quo in the relationships of major national oil corporations with each other was not mandated by Congress through the PMPA. In a rapidly changing economy fixed preservation of business relationships may spell financial death to the detriment of franchisees as well as franchisors.

Id. (citing *Russo,* 630 F.Supp. at 688).

In evaluating an economic business decision as it pertains to the PMPA, Congress cautioned against courts applying the business judgment rule, that is, whether a particular business decision was wise. *Brach,* 677 F.2d at 1222-23. Rather, courts should determine whether the business decision at issue was made in good faith, a subjective standard, and whether the determination was made in the normal course of business. *Id.* "The good faith requirement looks to whether the franchisor's actions are designed to conceal selective discrimination against individual franchises, ... but avoid[s] judicial scrutiny of the business judgment itself." *Unocal Corp. v. Kaabipour,* 177 F.3d 755, 767 (9th Cir.1999) (citations and internal quotation marks omitted).

In the instant case, we agree with the district court that there is no evidence that the Unocal PDV transaction regarding UNO-VEN was conducted in anything other than good faith. The evidence showed that UNO-VEN had been an economic drain on PDV MR because the partnership agreement contained a fixed margin provision whereby PDV had to supply UNO-VEN with crude oil at a price substantially below prevailing market prices. PDV had tried to buy out Unocal's share in UNO-VEN prior to 1996, but

Unocal wanted too much money. Finally, in or around 1996, Unocal decided to exit the "downstream" segment of the oil industry, which involves the refining and marketing segment of the industry, and Unocal agreed to lower its asking price. PDV-MR paid approximately $250 million to purchase Unocal's share of UNO-VEN.

Further, as part of the restructuring, UNO-VEN's trademark license agreement was terminated. As part of Unocal's plan to exit the downstream segment of the business in an arms-length transaction, separate from the PDV Unocal deal, Unocal sold its rights to the Union 76 trademarks to Tosco. UNO-VEN's relinquishment of its trademark rights was an essential part of the overall transaction. *Cf. May-Som,* 869 F.2d at 921-22 (explaining that the PMPA does not require a large scale divestiture undertaken for *bona fide* business reasons to be stymied by the right of individual franchisees to insist on a prior franchise relationship on exactly its former terms). Defendants have failed to point to a shred of evidence that would establish that the sale of the trademark to Tosco and UNO-VEN's related loss of the trademark were undertaken in bad faith. *See* 28 U.S.C. § 2802(c)(6); *see also Reyes v. Atlantic Richfield Co., ARCO,* 12 F.3d 1464, 1469-70 (9th Cir.1993) (explaining that once a franchisor shows that

termination occurred for a valid reason under the PMPA, franchisee is entitled to present evidence to show that the termination was based on an illegitimate criterion). Likewise, other than speculation, Defendants have failed to show that Plaintiffs' restructuring was not conducted in good faith and for valid business reasons. *Id.* Therefore, we hold that the restructuring and loss of the trademarks constituted a valid and reasonable basis to terminate the franchise. *Cf. Russo,* 630 F.Supp. at 688 (holding that large scale divestiture of assets, including trademark rights, constituted a sufficient basis for termination of franchise under the PMPA). Inasmuch as only one valid reason is needed under the PMPA to terminate a franchise, Plaintiffs here, which have offered two, albeit related and intertwined, reasons for the termination, certainly have met their burden of showing that termination was proper. [FN7] *See Thompson,* 903 F.2d 118 F.2d at 1120.

> FN7. Pursuant to 15 U.S.C. § 2804(a) and (c), a franchisor must also meet general notice requirements to franchisees before terminating a franchise. That section provides that notification of the termination must be made not less than 90 days prior to the date on which the termination takes effect. § 2804(a)(2). In the instant case, termination

took effect pursuant to the April 30, 1997 termination letter, in May 1998, and thus was clearly timely. Further, the statute also provides that the notification must meet other requirements set forth in § 2804(c) and (d). There is no issue in this case as to whether these requirements were met. The record clearly shows that they were and Defendants do not argue to the contrary. *Cf. Smith & Co., Inc. v. Motiva Enter. LLC,* 269 F.3d 70, 74 n. 3 (1st Cir.2001) (explaining that inasmuch as notice requirements under § 2804 of PMPA were undisputedly met, "it would serve no useful purpose" for the court "to discuss them in any detail").

D. Withdrawal from the relevant geographic market

As explained earlier, Defendants also argue that the real reason Plaintiffs terminated their franchise relationship with Armada was because Plaintiffs intended to withdraw from the market and not, as Plaintiffs contend, as result of loss of the trademark and/or UNO-VEN restructuring. Defendants contend that they have produced evidence that the real reason for the termination was Unocal's decision to

withdraw from the midwest market and that the specific notice requirements for such withdrawal were not met. Pursuant to 15 U.S.C. § 2802(b)(2)(E), termination is proper

> [i]n the case of any franchise entered into prior to June 19, 1978, and in the case of any franchise entered into or renewed on or after such date (the term of which is 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if (i) such determination--(I) was made after the date such franchise was entered into or renewed, and (II) was based upon the occurrence of changes in relevant facts and circumstances after such date ....

Id.

Where the decision to terminate involves § 2802(b)(2)(E), a franchisor must meet the notice requirements set forth in § 2804(b)(2)(B), which means that they must "promptly provide a copy of such notification, together with a plan describing the schedule and conditions under which the franchisor will withdraw

from the marketing of motor fuel through retail outlets in the relevant geographic area, to the Governor of each State which contains a portion of such area." *Id.*

Defendants argue that the notice requirements under § 2804(b)(2)(B) were not met inasmuch as no notice was provided to the governors of the states from which UNO-VEN withdrew. Defendants claim that this is significant because it shows why UNO-VEN and Unocal "undertook a sham transaction to terminate UNO- VEN's right to use the trademark" rather than to declare that those companies had decided to withdraw from the market.

Defendants point out that Thompson admitted that when Unocal ceased its involvement with UNO-VEN, a withdrawal from the market took place, and other testimony supported that both Unocal and UNO-VEN (the latter entity no longer existing), exited the geographic market.

We find Defendants arguments unpersuasive. First, there is no evidence that either the Unocal-Tosco or the Unocal-PDV transactions were shams or cover-ups for what Defendants claim was really a market withdrawal. Moreover, even assuming UNO-VEN and Unocal exited the geographic market, that still does not defeat the valid reason given for the termination. *See Thompson,* 903 F.2d

at 1120; *see also O'Shea v. Amoco Oil Co.*, 886 F.2d 584, 597-598 (3d Cir.1989) (explaining that "franchisor, defending a PMPA action, [may] not assert new reasons for the termination in court; the defendant must establish that the termination was proper under the PMPA based on the reasons that it gave to the franchisee in the notice of termination."). In the instant case, Plaintiffs informed Defendants at the outset that the reason for the termination was because of an event under § 2802(b)(2)(C) and loss of the trademarks. That position never changed. In addition, even where the facts underlying the decision for termination reveal motives other than those given, this alone does not mean that a franchisor may not exercise its rights to terminate a franchise under the PMPA where the reasons given are valid. *See e.g., Gruber v. Mobile Oil Corp.*, 570 F.Supp. 1088, 1096 (E.D.Mich.1983). [FN8]

FN8. In *Gruber*, 570 F.Supp. 1088, the franchisee had lease and franchise agreements with Mobile Oil Corporation ("Mobile"). *Id.* Mobile failed to renew the agreements with the plaintiff because it claimed plaintiff failed to comply with the hours of operation under the lease agreement and failed to keep the premises clean pursuant to the franchise agreement. *Id.* at 1089. The plaintiff, however,

contended that not only were those grounds not valid, but they were a pretext or sham for the real reason. Apparently Mobile wanted to convert the station into a "gas & snack" station, without automobile repair service. *Id.* at 1090. The plaintiff argued that Mobile wanted to drive him from the property because the PMPA required that Mobile offer to sell its interest in the property, unless the plaintiff consented to the destruction and rebuilding of the property in order to convert it into a "gas & snack" station. *Id.* The plaintiff contended that because he did not want to consent to the rebuilding and because Mobile did not want to give up its interest in the property, Mobile used the other grounds for termination as a sham for its true reasons. *Id.* at 1091. The district court found that although there was some evidence indicating that Mobile did want to convert the station into a "gas & snack" station, despite the plaintiff's refusal to consent, these facts did not mean that defendants could not rely on the valid reasons that they asserted for non-renewal of the franchise. *Id.* at 1096.

As for the market withdrawal, Bednar confirmed at trial that market withdrawal was not the stated or intended

reason for termination, so that the requirements under the PMPA related to market withdrawal were irrelevant and not met. He also testified that market withdrawal was not a proper description of the restructuring because PDV-MR acquired all of UNO-VEN's assets and actually continued to market petroleum products in UNO-VEN's former territory. He testified that it would have been misleading to classify the basis for the termination as a withdrawal from the market.

Defendants also contend that the real reason for the alleged "withdrawal" was so that PDV-MR could allow CITGO to convert the UNO-VEN stations to CITGO stations. Conners indicated that PDV-MR wanted to rebrand former UNO-VEN franchisees into CITGO stations. Defendants contend that this was the real reason that Plaintiffs offered franchisees a year to use the Union 76 trademark. It was Defendants' contention that Plaintiffs hoped that during the year Plaintiffs could convince franchisees to rebrand as CITGO stations. However, even assuming Plaintiffs may have had other motives for extending the one-year period, that does not negate their legitimate reasons for terminating the franchise. *See Gruber,* 570 F.Supp. at 1096. In addition, one of the principal purposes of the Act is to prevent the appropriation

of hard-earned good will that occurs when a franchisor arbitrarily takes over a business that the franchisee has turned into a successful going concern. *Thompson,* 903 F.2d at 1119. Inasmuch as the stations that Plaintiffs took over were to be rebranded to other brands and CITGO did not intend to use the good will established with the Union 76 brand, Plaintiffs did not contravene the purposes of the PMPA in that regard. [FN9]

FN9. Further, Plaintiffs point out that during this period, Defendants also convinced many stations to rebrand to British Petroleum ("BP"). In 1994, Armada entered into a ten-year contract with BP and began selling BP gasoline to some gas stations, which included rebranding some Union 76 stations to BP. Currently, Armada is the largest BP distributor in Michigan.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

FILED
SEPT 5, 2002

Leonard Green,
Clerk

00-2503

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PDV MIDWEST REFINING, L.L.C., ET AL.,
Plaintiffs/Counter Defendants-Appellees,

v.

ARMADA OIL AND GAS COMPANY, ET AL.,
Defendants/Counter Plaintiffs-Appellants.

BEFORE: CLAY and GILMAN, Circuit Judges;
and HAYNES,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

FILED
NOV 7, 2002

Leonard Green,
Clerk

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

* Hon. William J. Haynes, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN ORDER GRANTING IN PART & DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PDV MIDWEST REFINING LLC,
et. al.,

Plaintiffs/Counter-Defendants, **Case Number CV-72287-DT**

v.

Hon.GEORGE WOODS

ARMADA OIL & GAS COMPANY, INC.,
et. al.,

Defendants/Counter-Plaintiffs., and Third-Party Plaintiffs,

And

UNO-VEN COMPANY et. al., Third-Party Defendants.
_____/

ORDER GRANTING IN PART & DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 1st day of October, 1999.

PRESENT: THE HONORABLE GEORGE E. WOODS
United States District Judge

This matter having come before the Court on Plaintiffs' motion for summary judgment on Counts I, II, III and VI of Plaintiffs' complaint and on Defendants' counter--complaint [Document No. 114];

The Court having reviewed the pleadings submitted herein, and being otherwise fully informed in the matter;

IT IS HEREBY ORDERED that Plaintiffs' motion for summary judgment, relating to Plaintiffs, breach of contract and guaranty claims (Counts I and III), shall be, and hereby is, GRANTED IN PART, as Defendants, jointly and severally, are obligated to pay for the petroleum products they received, and DENIED IN PART, as a genuine issue of material fact exists with respect to whether $574,098.93 of the total amount is owed;

Plaintiff's motion for summary judgment on their quantum merit claim (Count II) shall be, and hereby is, DENIED, because Plaintiffs are entitled to recover under the contract;

Plaintiffs' motion for summary judgment with respect to their fraud claim (Count VI) shall be, and hereby is, DENIED;

Plaintiffs, motion for summary judgment on Count II of Defendants' counterclaim, alleging tortious interference of business relationship, shall be, and hereby is, GRANTED as unopposed; and

Plaintiffs' motion for summary judgment on Count I of Defendants' counterclaim, alleging a violation of the Petroleum Marketing Practices Act, 15 U.S.C. 2801-2841, shall be, and hereby is GRANTED IN PART, to the extent that Defendants seek recovery under 15 U. S.C. § 2802 (b) (2) (E) (iii) (II) because the uncontroverted facts establish that recovery is not warranted on that ground;

The remainder of Plaintiffs' motion for summary judgment on Defendants' PMPA counterclaim is DENIED, without prejudice.

I. BACKGROUND

On May 14, 1997, Plaintiffs PDV Midwest Refining LLC ("PDV") and CITGO Petroleum Corporation ("CITGO") filed an eight-count verified complaint alleging that Defendant corporation Armada Oil and Gas Company ("Armada") and individual Defendants Allie Berry

("Berry"), Ali Jawad ("Jawad") and Sam Haddas ("Haddas") obtained petroleum products through fraudulent means and failed to pay for over $3 million worth of petroleum products. Subsequently, on July 3, 1997, Defendants filed a counterclaim and third-party complaint alleging that both Plaintiffs and Third-Party Defendants UNO-VEN Company (hereinafter "UNO-VEN') and Union Oil Company of California (hereinafter "Unocal") violated the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 et seq., and Plaintiff CITGO and Third-Party Defendant Knight Enterprises, Inc., interfered with Defendants' business expectations and relationships. [FN1]

> FN1. By Order dated February 10, 1999, Third-Party Defendant Knight Enterprises was dismissed from this action. The remaining Third-Party Defendants, UNO-VEN and Unocal, were dismissed on August 30, 1999.

Individual Defendant Jawad purchased Armada, which operated as an unbranded gasoline distributor, or "jobber," in 1982. [FN 2] Armada supplied unbranded gasoline products to retail gas stations until 1990. On July 31, 1990, Armada executed a Marketer Sales Agreement ("Agreement") with UNO-VEN, which was renewed in

1995. [FN 3] Under the Agreement, Armada agreed to operate as a branded distributor for Unocal (or "76"-brand) motor fuels and lubricants. It is uncontroverted that Armada did not lease any premises from UNO-VEN; Armada only purchased petroleum products. Section 14 of the Agreement governed the terms of Armada's payment for the gasoline products. See Plfs.' Ex. B(1), the Agreement. [FN 4] On July 31, 1990, individual Defendants Berry, Jawad and Haddas entered a written personal guaranty for Armada's obligations under the Agreement. See Plfs.1 Ex. B(2), guaranty attached to DeVore Declaration. Currently, Jawad is the president and treasurer of Armada. See Jawad dep. at 10. Berry has served as Armada's vice-president and secretary for approximately ten years. Id.

FN2. Jawad has served as the president of Armada since 1982. See Plfs.' Ex. A, Jawad dep. at 6.

FN3. Armada entered a series of marketer sales agreements with UNO-VEN, the duration of which lasted from 1990 through 1998. See.Plfs.1 Ex. B, DeVore Declaration at ¶ 2.

FN4. Also under the Agreement, any retail gas stations receiving products from Armada were obligated to participate in UNO-VEN's credit card program, and accept valid Union 76 credit cards, as well as other approved credit cards. See Agreement at 18.

On April 18-, 1997, Plaintiff CITGO sent a letter to all UNOVEN distributors, including Armada, indicating that as of May 1, 1997, "UNO-VEN's refining and marketing assets will be transferred to an indirect subsidiary of Petroleos de Venezuela, S.A. [Plaintiff PDVI." Plfs.' Ex. C(2). Also on that date, Plaintiff CITGO became operator of both UNO-VEN's Lemont refinery and its terminals and lubricant facilities. Id. The letter also indicated that Plaintiff CITGO would administer all UNO-VEN Agreements for a one-year period, starting May 1, 1997, and continue to supply Unocal branded products during that time. id. Armada was also informed that during this one-year period, it could "continue to use the Unocal and 176' Marks, and accept the Union 76 credit card." Id.

Subsequently, on April 30, 1997, UNO-VEN sent a letter to Berry, reiterating the facts supplied in CITGO's earlier letter. Additionally, UNO-VEN explained:

> Because Unocal will no longer have an interest in the refining and marketing assets, **UNOVEN's right** to use the Unocal and 76 trademarks and credit card will be terminated .
>
> . . . As a consequence of the transaction. . . and as a result of the termination of UNO-VEN's right to use the Unocal and 76 trademarks and credit card, UNO-VEN hereby terminates and/or non-renews said Marketer Sales Agreement and does hereby terminate and/or non-renew any franchise relationship, effective as of may 1, 1998, one year from today's date. All agreements relating to the Marketer Sales Agreement are also hereby terminated and non-renewed as of the effective date, May 1, 1998.

Ex. B(3).

In response to the letters sent by CITGO and UNO-VEN, Armada sent a memorandum to its customers indicating that Armada's franchise agreement with UNO-VEN was terminated on May 1, 1997, not the May 1, 1998, date provided in CITGO's and UNO-VEN's letters. See Ex. D, Berry dep. at 56-59 & memo attached as D(2) Armada also expressed that:

> Most important is our position that UNO-VEN's statement for terminating your franchises, "loss of right to grant the use of the trademark which is the subject of the franchise."
>
> The most important aspect of this memo is to urge you NOT to sign any agreement with any competitor before you talk to us, for entering into a new BP franchise.
>
> Effective May 15, 1997, we (Armada Oil & Gas Co.) will not accept UNO-VEN or other credit cards processed thru. UNO-VEN POS machines.

Ex. D (2)(emphasis in original).

The parties do not dispute that subsequent to April 18, 1997, but before CITGO began administering UNO-VEN's Agreement, Armada continued to acquire petroleum products through UNO-VEN's distribution terminals. Plaintiffs contend that between April 14 and April 30, Armada had conducted several hundred transactions, but failed to honor the eleven electronic transfer drafts submitted by UNO-VEN. See Galloway Decl. at ¶ 4 & Ex. C (2) Plaintiffs contend that during this period, Armada purchased and failed to pay for products in

the amount of $2,412,657.82. Id. After May 1, 1997, when CITGO began administering the Agreement, Armada continued to acquire petroleum products and continued to refuse payment for the electronic fund transfer drafts submitted by CITGO, in the amount of See Galloway Decl. at ¶¶ 7-8 & Ex. C(5). After May 7, 1997, CITGO supplied petroleum "on a cash-on-delivery basis only." Galloway Decl. at ¶ 11. Plaintiffs have demanded payment for all of the purchases from both Armada and individual Defendants under the Guaranty. Defendants dispute the precise amount that is due, but admit that they have not proffered payment for these purchases.

Currently before this Court is Plaintiffs' motion for summary judgment on Counts I, II, III, and VI of their complaint, and both counts of Defendants' counter-complaint.

II. LEGAL STANDARD

Rule 56 mandates the entry of summary judgment if all the evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The moving party has the burden of showing that there is an absence of evidence to support

the nonmoving party's case. Id. at 325. Thus, this Court determines "whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." .Terry Barr Sales Agency, Inc. v. All-Lock Co., Inc., 96 F.3d 174, 178 (6th Cir. 1996) (citations omitted) This Court does not weigh the evidence but determines whether there is a genuine issue for trial, viewing the record as a whole and viewing all the facts in a light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 578 (1986).

In order to avoid summary judgment, the opposing party must have set out sufficient evidence in the record to allow a reasonable jury to find for him at trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) "[A] party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Id. at 256. Summary judgment is appropriate if the evidence favoring the nonmoving party is merely colorable or is not significantly probative. City Management Corp. v. United States Chem. Co., 43 F.3d 244, 254 (6th Cir. 1994).

III. DISCUSSION

A. Count I—Breach of Contract

Plaintiffs currently seek $3,065,387.13 against Defendant Armada for failure to pay for petroleum products supplied to Defendants under the parties' Agreement. See Galloway Decl. at ¶ 9. [FN5] The Court applies Illinois law to resolve the dispute because the Agreement specifies that Illinois law governs any dispute under the Agreement. See Agreement at ¶ 31(d). Armada admits that it has not paid for the petroleum products it purchased from UNO-VEN and its successor, CITGO. See Def s. I Br. at 13. Defendants incorrectly assert, however, that their breach is excused because of Plaintiffs, alleged violation of the Petroleum Marketing Practice Act ("PMPA"), 15 U.S.C. 2801-06.

FN5. Plaintiffs explain that this figure is smaller than the amount specified in their complaint because CITGO received credit card payments from Armada's customers that were not subject to Armada's approval for some of the purchases. Galloway Decl. at 10.

Plaintiffs assert, and Defendants do not disagree, that Plaintiffs must show the following to establish a breach of contract under Illinois law: "[the existence of] a valid contract, plaintiff's performance, defendant's breach and damages." CGE Ford Heights, LLC v. Miller, 714 N.E.2d 35, 41 (Ill. App. Ct. 1999) (citing Elson v. State Farm Fire & Cas. Co., 295 Ill.App. 3d 1, 6, 691 N.E.2d 807, 811 (Ill. App. Ct. 1998)).

It is undisputed that the Agreement between UNO-VEN and Armada was valid and enforceable, and that UNO-VEN assigned the Agreement to PDV. It is also undisputed that PDV retained CITGO to administer the Agreement. Further, Armada admits that it accepted, but did not pay for, these petroleum products. See Defs.' Br. at 13. It is clear, therefore, that Armada is obligated to pay under the Agreement.

Defendants alternatively argue that summary judgment is not appropriate because Plaintiffs misstate the amount due. Defendants contend that Plaintiffs overstate liability by $574,098.93 by failing to subtract: (1) credit card sales, (2) two disputed credit charge backs, (3) amounts earned in marketer incentive programs, and (4) shared advertising revenue. See Defs.' Br. at 13-15. Defendants submit the affidavits of their accountant, Nawal

Zqaihi, and individual Defendant Berry to support Defendants' claim that Plaintiffs overstated Defendants, liability. In response, Plaintiffs submit a supplemental declaration of James Galloway, in which Galloway counters that Defendants' averments are incorrect. See Galloway Supp. Decl. at ¶¶ 2-7.

Defendants first contend that Plaintiffs failed to credit $234,961.76 in credit card sales. See Defs.' Ex. B, Berry Aff. at ¶ 17. Defendants failed to produce evidence other than Berry's and Zqaihil's conclusory statements. Although Zqaihi asserts that her conclusion was derived "as a result of [an] examination (of] Plaintif f s I documentation, " Def s.' Ex. L, Zqaihi Aff . at ¶ 8, Defendants do not reveal how they came to this conclusion, or identify the portion of Plaintiffs, documents that supports their claim. Although Defendants' evidence is not sufficient to support summary judgment in their favor, it is sufficient to create a fact issue precluding Plaintiffs, request for summary judgment as to the $234,961.76 that Defendants claim Plaintiffs failed to credit.

Defendants next contend that they have contested two charge backs totaling $47, 142.55, and argue that this amount should not be included. See Berry Aff. at ¶ 12; and Defs.' Ex. N, Statement of Account. It appears that the

charge backs either represent sales that were prohibited by the credit card agreement or charges that were not paid by the ultimate credit card user. See Defs.' Ex. I, Galloway dep. at 22; Galloway Supp. Decl. at ¶ 5. Defendants disagree. It is equally unclear whether the time for making a charge back expired. See Galloway dep. at 23-24. Thus, a material fact question remains with respect to whether Defendants are obligated to pay this $47,142.55 in charge backs under the parties' Agreement.

Defendants also contend that they are entitled to credits under the market incentive program for the last three quarters of 1997, from April 1997 through March 1998, and also for April 1998. Specifically, Defendants assert that they are entitled to credits in the amount of $225,712.32 and $10,423.30 respectively, under the market incentive program. See Berry Aff. at ¶ 14. Plaintiffs counter that Defendants were not eligible for incentives for either time period because Defendants did not meet the threshold purchase volumes. See Galloway Supp. Decl. at ¶ 6. Plaintiffs neither identify the volumes required nor produce evidence illustrating that this volume was not met. Thus, the dispute, on the current record, can be resolved only by assessing the credibility of the witnesses. The

Court cannot engage in such findings on summary judgment. See Matsushita, 475 U.S. at 578.

In their brief, Defendants last contend that they are entitled to $55,859 for shared revenue advertising expenses. Plaintiffs contend, however, that Defendants never submitted the appropriate documentation in order to obtain reimbursement. See Galloway Supp. Decl. at ¶ 7. From these submissions, however sparse they may be, it is clear that the Court cannot resolve this issue on summary judgment.

In sum, although Defendants fail to establish that they are entitled to summary judgment on the amount they allege constitutes an overcharge, they have produced sufficient evidence to create a genuine issue of material fact with respect to the contested amounts only. Thus, in order to resolve the dispute, the Court would be required to engage in credibility findings. Because this issue can be resolved only by assessing the credibility of the witnesses and by weighing the evidence, it must be decided by the trier of fact at trial and not by this Court on a motion for summary judgment. See Matsushita, 475 U.S. at 578. Accordingly, Plaintiffs' are entitled to partial summary judgment in their favor for the undisputed balance of $2,738,097.14, as it is undisputed that Defendants breached

the Agreement by not paying for all the petroleum products they purchased. Whether Defendants are obligated to pay all, a portion, or none of the remaining $574,098.93 is left for the trier of fact at trial.

B. Count II—Quantum Meruit

Count II of Plaintiffs' complaint seeks recovery against Defendant Armada for the $3,312,196.07 in petroleum products received by Armada under the theory of quantum meruit. The Court Is finding above, that Plaintiffs are entitled to recover under the parties' contract, disposes of their quantum meruit claim: "Illinois does not permit recovery on a theory of quasi-contract when a real contract governs the parties' relations." Murray v. Abt Associates, Inc., 18 F.3d 1376, 1379 (7th Cir. 1997) (applying Illinois law) (internal citations omitted). The Court has ruled above that Defendants are obligated under the contract. Therefore, Plaintiffs are not entitled to recovery under a theory of quantum meruit, and.the Court thus denies Plaintiffs' motion for summary judgment on this count.

C. Count III—Guaranty

Plaintiffs also contend that they are entitled to summary judgment against the individual Defendants for the amounts owed, because the individual Defendants executed a Guaranty providing that they "jointly and severally, unconditionally agree to pay to UNO-VEN such sum or sums of money . . . become due to UNOVEN. Ex. B(2). The Guaranty explicitly specifies that it "inure[s] to the benefit of and be binding upon the successors and assigns of UNO-VEN." Id.

Defendants first argue that the 1990 Guaranty was released. Defendants suggest that because the Guaranty was not "reaffirmed" when Defendants renewed their Agreement with UNO-VEN in 1995, the Guaranty did not continue. Although the Guaranty specified that it could be terminated at any time, the Guaranty explicitly requires that Defendants must provide:

> . . . notice in writing to UNO-VEN to that effect, together with payment to UNO-VEN of the amount of money, if any, for the time being owing by Debtor to UNO-VEN. Notice of termination of this Guaranty Agreement shall not be effective until written notice has been received by

UNO-VEN's Commercial Credit Department at
1850 East Golf Road, Schaumburg, Illinois 60196.

Id. Accordingly, under the explicit terms of the Guaranty, there was no requirement that Defendants reaffirm the 1990 Guaranty in order for it to remain effective.

Defendants next contend that even if the Guaranty was not released, it should be disregarded. Notwithstanding the plain language of the Guaranty, Defendants argue that the Guaranty limited Defendants, total liability to $250,000. Defendants arrive at this figure by subtracting the $500,000 letter of credit from the $750,000 line of credit which was provided at the time the Agreement was entered. Neither the language of the Guaranty nor any pertinent case law supports such a strained reading. Indeed, Defendants failed to cite, nor could they cite, support for such a novel interpretation.

Defendants next contend that Plaintiffs, in essence, extended Defendants, credit beyond the $750,000 agreed by the parties by continuing to supply Defendants with petroleum products notwithstanding Defendants' failure to pay previous balances. They assert that this action thus released them from the Guaranty. Defendants misconstrue the Michigan Court of Appeals' decision in Wilson Leasing

Co. v. Seaway Pharmacal Corp., 53 Mich. App. 359 (Mich. Ct. App. 1974). The Wilson court held that when the plaintiff materially altered the principal agreement, the material alteration released defendants from their obligations as guarantors. Id. at 369-70.

Here, Plaintiffs did not materially alter the underlying contract between Plaintiffs and Defendants. Because there was no material alteration in the Agreement that would adversely affect Defendants, obligations as guarantors, Defendants, reliance upon Wilson is entirely misplaced.

In short, the Guaranty is enforceable, and Plaintiffs are entitled to summary judgment on this claim. Consistent with the conclusion reached above, Plaintiffs are entitled to summary judgment against the individual Defendants only on the undisputed portion of the amount due under the Agreement, not the $574,098.93 disputed by Defendants.

D. Count VI—Fraud

Plaintiffs also contend that they are entitled to summary judgment because Defendants Armada and Berry are guilty of fraud. Plaintiffs argue that their claim of fraud is established because Armada had no intention of paying for any petroleum products after receiving CITGO's April

18, 1997, letter. In order to establish an action for fraud, Plaintiffs must show:

> (1) that the defendant made a material representation, (2) that the representation as false, (3) that when the defendant made the representation, it was known to be false, or was made recklessly, without any knowledge Of its truth and was made as a positive assertion, (4) that the defendant made the representation with the intention that it should be acted on by the plaintiff, (5) that the plaintiff acted in reliance on it, and (6) that the plaintiff suffered damages as a result.

H.J. Tucker & Assoc., Inc. v. Allied Chucker & Engineering Co., 235 Mich. App. 550,_____, 595 N.W.2d 176, 187 (Mich. Ct. App. 1999) (citations omitted). Additionally, a "claim for 'silent fraud' requires a plaintiff to set forth a more complex set of proofs." M&D, Inc. v. W. B. McConkey, 231 Mich. App. 22, 28 (Mich. Ct. App. 1998). Under Michigan Law, "a claim of silent fraud is established when there is a suppression of material facts and there is a legal or equitable duty of disclosure." Id. 36.

[FN 6] Not surprisingly, Defendants deny that they ever defrauded Plaintiffs.

> FN6. The Court is not entirely convinced that Michigan, as opposed to Illinois, Law governs this tort claim. Regardless, the Court's analysis would be the same under either state's law, as both states recognize that silence can constitute actionable fraud: "Mere silence in a transaction does not amount to fraud. . . . Silence accompanied by deceptive conduct or suppression of material facts, however, can give rise to concealment and 'it is then the duty of the party which has concealed information to speak.'" Hirsch v. Feuer, 299 Ill. App. 3d 1076, 1086, 702 N.E. 2d 265, 273 (Ill. App. Ct. 1998) (internal citations omitted).

This Court , having reviewed and considered the limited record evidenced before it, cannot state that the facts are so one-sided that a reasonable jury could return only a verdict in favor of Plaintiffs on their fraud claim. This claim, which bears substantially on Defendants' motives and intent, is simply not ripe for summary

judgment. Thus, the fact finder at trial must decide who should prevail on this claim.

E. Count I of Counterclaim—PMPA

Plaintiffs also contend that they are entitled to summary judgment on Count I of Defendants' counterclaim, which alleges that Plaintiffs terminated Defendants' jobbership in violation of the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2841. In their counterclaim, Defendants contend that:

> The termination of Armada's jobbership as of May, 1988 [sic - 19981 was not based upon, and not even alleged to be based upon, any grounds permitted under the Petroleum Marketing Practices Act . . . .

Counterclaim at 15. Defendants assert that they believe Plaintiffs' reason for termination was UNO-VEN's withdrawal from the geographic market. See Counterclaim at PAR 16. Defendants contend that UNO-VEN's withdrawal was merely a sham and thus violative of the PMPA. Id. at ¶ 17. Defendants alternatively contend that even if the transaction was not a sham, a PMPA violation

still exists because Plaintiffs, as the purchasers, "failed to offer Armada a jobbership on the same terms and conditions as the Counter-Defendants other jobberships in Michigan." Id. at ¶ 18.

Recognizing that franchisors wielded a great deal of bargaining power as compared to franchisees, Congress enacted the PMPA to protect franchisees from arbitrary or discriminatory terminations. See S. Rep. No. 95-731, 95th Cong.2d Sess. 15-19, reprinted in 1978 U.S.C.C.A.N. 873, 874-77; Massey v. Exxon Corip., 942 F.2d 340, 342 (6th Cir. 1991) . Nevertheless, the Sixth Circuit has cautioned that the PMPA "should not be interpreted to reach beyond its original language and purpose." May-Som Gulf, Inc. v. Chevron U.S.A., Inc., 896 F.2d 917, 921 (6th Cir. 1989).

The parties agree that the PMPA allows a franchisor to terminate or not renew a franchise based on certain enumerated grounds, provided that the termination also complies with PMPA's notice provisions. See 15 U.S.C. § 2802(b) (1) (A-B) & (b) (2-3) it is undisputed that the franchise was terminated. Thus, Plaintiffs have the onus to show that termination was proper pursuant to one of the grounds enumerated by the PMPA. As the Sixth Circuit explains:

> The Act imposes upon the franchisee the initial burden of showing that the franchise has been terminated or not renewed. [Massey, 942 F.2d at 342.] 15 U.S.C.A. § 2805(c). The burden then shifts to the franchisor to establish as an affirmative defense that such termination or nonrenewal was permissible under the Act. See id.

Evans v. Marathon Oil Co., 1999 WL 137633 at *2 (6th Cir. Mar. 2, 1999).

Plaintiffs contend that Defendants' claim under the PMPA must fail for several reasons. ' First, Plaintiffs assert that Defendants incorrectly argue that UNO-VEN failed to identify the reason for terminating the Agreement as required under the PMPA. This Court agrees. Plaintiffs, April 30, 1997, letter to Defendants explicitly and unequivocally states, in relevant part:

> In compliance with the provisions of the Petroleum Marketing Practices Act, you are hereby notified that the grounds for the above action [termination of the Agreement effective May 1, 1998] are that:

1. An event has occurred which is relevant to the franchise relationship and as a result of which termination of the franchise and nonrenewal of the franchise is reasonable.

2. UNO-VEN has lost the right to grant the use of the trademark which is the subject of the franchise

Plfs. Ex. B(3) (emphasis added) Although Plaintiffs did not provide the specific statutory section of the PMPA paraphrased in the letter, it is clear that Plaintiffs rely upon Sections 2802(b)(2)(C) and 2802(c)(6).

Notwithstanding Defendants, claim that the termination was premised on UNO-VEN's withdrawal from the geographic market, the Court first addresses whether termination on the ground asserted by Plaintiffs, loss of the right to use the Unocal and 76 trademarks, comports with the PMPA. Section 2802 (b) (2) (C) states, in pertinent part:

The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event

> occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence-
> (i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) . . . .

§ 2802(b)(2)(C)(i). Section 2802(c), in turn, defines events constituting a reasonable termination or nonrenewal to include:

> loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise, unless such loss was due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor . . . .

§ 2802(c)(6).

Defendants first contend that a voluntary divestiture of a trademark does not qualify as a "loss" under Section

2802 (c) (6). Plaintiffs rely upon the Second Circuit's decision in Russo v. Texaco, Inc., 808 F.2d 221 (2d Cir. 1986), to support their claim that a voluntary divestiture qualifies as a loss. The Court of Appeals held that the defendant's transfer of the Getty name and mark was a critical factor in determining an event relevant to the franchise relationship as set forth under Section 2802(b)(2)(C). Id. at 226. Although the Russo court ultimately deemed the defendant's loss of trademark rights to be involuntary, id. at 227, Defendants incorrectly identify as dictum the Russo court's initial ruling that "the word loss' as used in § 2802(c) is intended to cover voluntary as well as involuntary situations." Id. The Russo court explicitly rejected the plaintiff's contention that the defendant's divestiture of the Getty trademark does not fit within Section 2802(c) "on two grounds:" (1) Consistent with the intent and other statutory provisions of the PMPA, Section 2802(c) applies for both voluntary and involuntary losses of a trademark; and (2) notwithstanding the private agreement between the defendant and Power Test, the purchaser of the Getty mark, Texaco's loss of trademark rights should be considered involuntary in light of the Federal Trade Commission's divestiture order. Id. at 227-28.

Defendants rely on an unpublished order of the Eastern District of Wisconsin for the proposition that a voluntary loss does not qualify as a loss contemplated by Section 2802(c). See Dragger Oil Co. v. The UNO-VEN Co., Case No. 99-C-317 (E.D. Wis. Aug. 4, 1999) . Defendants' reliance on this decision is misplaced. The Dragger court, ruling on a motion to dismiss, expressed only that because a question exists regarding whether a voluntary sale of a trademark constitutes a loss under Section 2802 (c) , dismissal under the more lenient Rule 12(b) (6) standard was not appropriate.

Furthermore, this Court respectfully disagrees with the preliminary conclusion on this issue reached by the Dragger court. Although the courts that have ruled that a "loss" can be a voluntary event dealt with other provisions of the PMPA, see generally Hutchens v. Eli Roberts Oil Co., 838 F.2d 1138, 1141-42 (11th Cir. 1988); Lugar v. Texaco, Inc., 755 F.2d 53, 56 (3d Cir. 1985), the Second Circuit correctly observed that:

> It is a settled principle of statutory construction that 11[w]hen the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be

construed to have the same meaning in the next place."

Russo, 808 F.2d at 227 (citations omitted) See also National Credit Union Admin. v. First Nat. Bank & Trust Co., 522 U.S. 479, 501 (1998) ; First City Bank v. National Credit Union Admin. Bd., 111 F.3d 433, 438 (6th Cir. 1997) , cert. denied, 118 S. Ct. 1162 (1998).

Finally, as for Defendants' and the Draecrer court's contention that Lugar, supra, and Veracka v. Shell Oil Co., 655 F.2d 445 (1st Cir. 1981) are "of questionable authority" in light of Congress' 1994 amendments to the PMPA, this Court notes that although Congress did amend Section 2802(c)(4) to require a franchisor to offer to assign to the franchisee any option to extend the lease or option to purchase the premises, see PMPA Amendments of 1994, Pub.L. No. 103-371, sec. 3, § 102(c)(4), 108 Stat. 3484 (codified at 15 U.S.C. § 2802(c)(4)(B) (West Supp. 1996)), it did not alter the Lugar and Veracka courts' underlying rationale, namely that a voluntary loss constitutes a proper event making termination reasonable under Section 2802(c). When Congress wished to deal with what a franchisor must do before terminating a franchise based on the nonrenewal of an option, the factual scenario presented

in Lugar and Veracka, Congress only dealt with this specific concern. Congress did not take the route available to it of amending the statutory language to limit covered events to involuntary and not voluntary losses. Nothing in the text of the amendments or in the accompanying legislative history, see H.R. Rep. No. 103-737 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2779; S. Rep. No. 103-387 (1994), *reprinted* at 1994 WL 534750; 140 Cong. Rec. H10575-01 (daily ed. Oct. 3, 1994); 140 Cong. Rec. H10735-01 (daily ed. Oct. 4, 1994); 140 Cong. Rec. S14236-02 (daily ed. Oct. 5, 1994), demonstrates an intent to redefine or change what type of loss of lease, i.e., voluntary or involuntary, satisfies Section 2802(b)(2)(C). Therefore, even though the result reached in Lugar may no longer be the law under the PMPA because the franchisor must additionally offer "any option to extend the underlying lease or option to purchase the marketing premise that is held by the franchisor," before terminating the franchise, there is no reason to doubt that Lugar and Veracka remain the standard with respect to their interpretation of the meaning of the term "loss." [FN7]

FN7. The Court additionally notes that if the franchisor does not have an option to extend the

lease or an option to purchase the marketing premise, the 1994 PMPA amendment is not implicated.

Even accepting Plaintiffs' contention that a voluntary loss of a trademark suffices under Section 2802(c) of the PMPA, Plaintiffs additionally must show that they "first acquired actual or constructive knowledge of such occurrence . . . not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a). §2802(b)(2)(C)(i). Defendants argue that Plaintiffs fell outside this time period, arguing that Plaintiffs knew of the loss of franchise rights in December 1996. See Sedlacek dep. At 60-61. Plaintiffs alternatively suggest that they acquired knowledge of the trademark loss on May 1, 1997, see DeVore Decl. at Par Par 4-5, or sometime in late March or early April 1997. See Plfs.' Ex. H, Conners dep. at 35-36. A review of the submissions reveals that Plaintiffs have failed to submit evidence from which this Court could unequivocally ascertain when Plaintiffs acquired knowledge regarding the loss of trademark rights. As set forth above, Plaintiffs bear the burden of establishing their affirmative defense and, similarly, their entitlement to

summary judgment on this basis. Accordingly, Plaintiffs, motion for summary judgment on the PMPA claim must be denied.

Defendants alternatively maintain that despite Plaintiffs' claim that the termination was premised on the loss of the use of the trademarks, the termination was actually premised upon UNO-VEN's withdrawal from the geographic market. Plaintiffs counter that summary judgment is still appropriate even if the termination had been grounded on a withdrawal from the geographic market because the PMPA authorizes termination on this basis. See 15 U.S.C. § 2802(b)(2)(E). [FN8]

> FN8. The Court additionally observes that Defendants presented sufficient evidence to create a fact question with respect to whether Plaintiffs' termination was premised on the reason they articulated, loss of the use of the trademark, or the reason Defendants cite—a decision to withdraw from the geographic market. See, e.g., Defs.' Ex. H, Sedlacek dep. at 136-37.

Although the PMPA authorizes terminations based on a franchisor's decision to withdraw from a geographic

market, certain preconditions must be met. First, the franchisor's decision must be made "in good faith and in the normal course of business." See § 2802(b)(2)(E). Second, the decision must be made subsequent to the date the franchise was renewed and based on "changes in relevant facts and circumstances" that transpired after the franchise was renewed. See 2802(b)(2)(E)(i)(I-II). Additionally, the termination cannot be "for the purpose of converting the [franchise] premises . . . to operation by employees or agents of the franchisor for such franchisor's own account." See § 2802(b)(2)(E)(ii)

The Court notes that the question of a franchisor's good f aith is a subjective inquiry. See Massey, 942 F.2d at 345. Accord, Duff v. Marathon Petroleum Co., 51 F.3d 741, 744 (7th Cir. 1995). This requirement is designed to prevent sham determinations from being used as artifice for nonrenewal. See Massey, 942 F.2d at 345 (quoting legislative history of the PMPA); Duff, 51 F.3d at 744. The second inquiry under § 2802 (b)(2)(E) requires an examination of the franchisor's normal decision-making process. See Duff, 51 F.3d at 744. The PMPA does not, however, give the courts the authority to evaluate the wisdom of business decisions. See Massey, 942 F.2d at 345; Duff, 51 F.3d at 744.

In the present case, Plaintiffs did not present evidence from which the Court could summarily conclude that the decision was calculated in good faith and in the normal course of business. Plaintiffs have not produced evidence from which this Court could find, pursuant to Fed. R. Civ. P. 56, that the uncontroverted facts are so one-sided that Plaintiffs must prevail as a matter of law. See Terry Barr, 96 F.3d at 178. Thus, Plaintiffs are not entitled to summary judgment on this ground.

Defendants' also assert that liability under the PMPA attaches because Plaintiffs failed to offer Armada a jobbership under the terms as others possessing franchises from Plaintiffs. Plaintiffs counter that Defendants, claim fails because they misconstrue the PMPA provision upon which they base their claim. [FN9] This Court agrees. The PMPA provision Defendants apparently rely upon, 15 U.S.C. § 2802(b)(2)(E)(iii)(II), applies only to leased marketing premises, and it is uncontroverted that Defendants did not lease premises from UNO-VEN. See, e.g., DeVore Decl. at ¶ 2. Accordingly, Defendants cannot seek recourse under this provision, and Plaintiffs are entitled to summary judgment as to this aspect of Defendants, counterclaim.

FN9. Under the PMPA, a franchisor purchasing a preexisting franchise must offer a franchise to a terminated franchisee, under the same terms offered to its current franchisees, provided that: (1) the original franchisor terminated the franchise because of a withdrawal from the market, (2) the franchisee's operation is located on premises leased by the franchisor, and (3) the original franchisor assigned or transferred its interest in the premises along with its interest in other marketing premises to the second franchisor. See 15 U.S.C. 2802(b)(2)(E)(iii)(II).

F. Count II of Counterclaim—Tortious Interference

Plaintiffs lastly contend that they are entitled to summary judgment on Count II of Defendants' counterclaim. In their counterclaim, Defendants allege that CITGO and former Third-Party Defendant Knight Enterprises tortiously interfered with the contracts between Armada and its retail dealers by obtaining a temporary restraining order ("TRO") with this Court. Defendants fail to provide any argument with respect to why Plaintiffs are not entitled to summary judgment on this claim. The Court further notes that Defendants' counterclaim repeatedly

incorrectly avers that the "TRO [was] improperly obtained." See, e.g., Counterclaim at ¶ 28. To the contrary, Plaintiffs properly sought relief, which was granted by this Court. It is immaterial that the parties later agreed to dissolve the TRO. Plaintiffs, reliance on the Michigan Court of Appeals; opinion in Early Detection Center, P.C. v. New York Life Ins. Co., 157 Mich. App. 618 (Mich. Ct. App. 1986), is well placed. As the Early Detection court stated:

> Plaintiffs' allegations with regard to this claim were essentially that, by filing a groundless suit, the defendants interfered with their medical business. However, in order to succeed under a claim of tortious interference with a business relationship, the plaintiffs must allege that the interferer did something illegal, unethical or fraudulent. Weitting v. McFeeters, 104 Mich.App. 188, 198, 304 N.W.2d 525 (1981) . There is nothing illegal, unethical or fraudulent in filing a lawsuit, whether groundless or not. No actionable claim was stated under this count.

Id., 157 Mich. App. at 631, 403 N.W.2d at 836.

It is well settled that:

The elements of tortious interference with a usiness relationship are the of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff. Lakeshore Community Hosp. v. Perry, 212 Mich. App. 396, 401, 538 N.W.2d 24 (1995). To establish that a lawful act was done with malice and without justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference. Feldman v. Green, 138 Mich. App. 360, 369, 360 N.W.2d 881 (1984). Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference. Michigan Podiatric Medical Ass'n v. Nat'l Foot Care Program, Inc., 175 Mich. App. 723, 736, 438 N.W.2d 349 (1989).

BPS Clinical Lab. v. Blue Cross & Blue Shield of Michigan, 217 Mich. App. 687, 698-99 (1996) , appeal denied, 456 Mich. 881 (1997), and cert. denied, 118 S. Ct. 1178 (1996). [FN10] Defendants provided no response to Plaintiffs, motion on this claim. Accordingly, this Court is satisfied that Defendants' claim of tortious interference with business relations should be dismissed on Plaintiffs' unopposed motion for summary judgment.

> FN10. Illinois law applies the same analysis. See generally, Turner v. Fletcher, 302 Ill.App. 3d 1051, 1058, 706 N.E.2d 514, 519 (Ill. App. Ct. 1999)(tortious interference with contract).

IV. CONCLUSION

For the reasons set forth above, Plaintiffs' motion for summary judgment with respect to their claims for breach of contract and guaranty (Counts I and III) is GRANTED IN PART, as Defendants, pursuant to the contract with Defendant Armada and via the Guaranty executed by individual Defendants, are obligated to pay for the petroleum products they received, and DENIED IN PART, as a genuine issue of material fact exists with

respect to whether $574,098.93 of the total amount asserted by Plaintiffs is due.

Accordingly, Plaintiff's motion for summary judgment on their quantum meruit claim (Count II) is DENIED, as this Court finds that Plaintiffs are entitled to recover under the contract.

Plaintiffs' motion for summary judgment with respect to their fraud claim (Count VI) is DENIED, as genuine issues of material fact remain.

Plaintiffs' motion for summary judgment on Count II of Defendants' counterclaim, alleging tortious interference of business relationship, is GRANTED as unopposed.

Plaintiffs' motion for summary judgment on Count I of Defendants' counterclaim, alleging a violation of the PMPA, is GRANTED IN PART, to the extent that Defendants seek recovery under 15 U.S.C. § 2802(b)(2)(E)(i i i)(I I) because the uncontroverted f acts establish that recovery is not warranted on that ground.

FILED
SEPT 1, 1999

Eastern District
of Michigan

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN MEMORANDUM OPINION AND ORDER CONTAINING THE COURT'S FINDING OF FACT AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PDV MIDWEST REFINING LLC,
et. al.,

Plaintiffs/Counter-Defendants,

Case Number
CV-72287-DT

v.

Hon.GEORGE
WOODS

ARMADA OIL & GAS
COMPANY, INC.,
et. al.,

Defendants/Counter-Plaintiffs.

MEMORANDUM OPINION AND ORDER
CONTAINING THE COURT'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW

AT A SESSION of said Court, held in the United States Courthouse, 'in the City of Detroit, 8~ate of Michigan, on the 3rd day of October, 2000.

PRESENT: THE HONORABLE GEORGE E. WOODS
United States District Judge

This matter came before the Court for a bench trial, commencing on June 23, 2000, and concluding on July 10, 2000. Upon completion of the seven-day trial, the Court hereby enters the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. p. 52(a).

I. INTRODUCTION

The Court has considered the Amended Joint Final Pretrial Order, the opening statements of counsel, the parties' proposed Findings of Fact and Conclusions of Law submitted at the close of trial, the testimony of witnesses at trial, documents and photos admitted as exhibits at trial, as well as deposition excerpts designated by the parties at trial. The Court has considered what inferences can reasonably be drawn from the direct and circumstantial evidence, and has considered the demeanor and manner of the witnesses who testified at trial in assessing the credibility of and weight to be accorded to the testimony of those witnesses. This opinion contains the Court's Findings of Fact and Conclusions of Law, in accordance with Rule 52(a).

II. BACKGROUND

The following background was derived primarily from the parties' stipulated facts set forth in their Amended Joint Final Pretrial Order. Plaintiffs/Counter-Defendants are PDV Midwest Refining LLC ("PDV-MR") and CITGO Petroleum Corporation ("CITGO") PDV-MR is a Delaware corporation having its principal place of business in Tulsa, Oklahoma. CITGO is a Delaware corporation having its principal place of business in Tulsa, Oklahoma.

Defendants/Counter-Plaintiffs are Armada Oil and Gas Company, Inc. ("Armada"), Allie Berry ("Berry"), Ali K. Jawad ("Jawad") and Sam Haddas ("Haddas"). Armada is a Michigan corporation having its principal place of business in Dearborn, Michigan. Berry, Jawad and Haddas are Michigan citizens.Jawad is Armada's president. Berry has been Armada's vice-president since 1986. Haddas is Jawad's father-in-law.

Third-Party Defendants are Knight Enterprises, Inc. ("Knight"), UNO-VEN Company ("UNO-VEN") and Union Oil Company of California hereinafter "Unocal"). UNO-VEN was formed as an Illinois Partnership in 1982.

On May 14, 1997, Plaintiffs PDV-MR and CITGO filed an eight count verified complaint alleging that Defendants Armada, Berry, Jawad and Haddas obtained petroleum products through fraudulent means and failed to

pay for over $3 million worth of petroleum products. Subsequently, on July 3, 1997, Defendants filed a counterclaim and third party complaint alleging that both Plaintiffs and Third-Party Defendants UNO-VEN and Unocal violated the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801-2841, and Plaintiff CITGO and Third-Party Defendant Knight interfered with Defendants' business expectations and relationships. All Third-Party Defendants were dismissed from this action prior to trial. [FN1]

FN1. By Order dated February 10, 1999, Third-Party Defendant Knight was dismissed from this action. The remaining Third-Party Defendants, UNO-VEN and Unocal, were dismissed on August 30, 1999. PDV-MR and CITGO have assumed liability for any compliance requirements or obligations under the PMPA on the part of UNOCAL or UNO-VEN. See Stipulated Fact 42

By Order dated October 1, 1999, this Court granted partial summary judgment in favor of Plaintiffs, on their contract claim, holding that Defendants were contractually liable for petroleum products they took without payment.

The Court found that an issue of fact remained with respect to a portion of the amount to which Plaintiffs claimed entitlement. The remainder of Plaintiffs' claim against Defendants was resolved prior to trial. See Settlement dated June 16, 2000. The only claims remaining at trial were Defendants'/Counter-Plaintiffs' claims under the PMPA.

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 to resolve Defendants'/Counter-Plaintiffs' claims under the PMPA. Defendants maintain that Plaintiffs failed to comply with the PMPA when Plaintiffs terminated Defendants' franchise. Plaintiffs assert that termination is proper due to the restructure of the UNO-VEN partnership and the loss of the use of the Union 76 trademarks. Defendants counter that Plaintiffs' two bases for termination should be construed as one. Defendants alternatively argue that the reasons provided by Plaintiffs masked the true basis of the termination—withdrawal from the geographic market—and Plaintiffs did not comply with the PMPA's requirements for withdrawal from the market. Defendants further contend that Plaintiffs did not meet the PMPA notice requirements.

III. FINDINGS OF FACT

A. The Parties

1. In 1989, UNO-VEN was formed as an Illinois partnership between subsidiaries of two oil companies: Unocal and Petroleos de Venezuela, S.A. ("PDV"). [FN2] Prior to May 1, 1997, UNO-VEN was owned equally by partners PDV-MR and Unocal. See, Plfs.' Ex. 1, Partnership Agreement; 6/23/00 Jerald Thompson testimony at 34-36; Stipulated Fact 3. [FN3]

FN2. As represented by Plaintiffs throughout the proceedings in this case, all of the PDV entities discussed in this Order are subsidiaries or affiliates of Petroleos de Venezuela, S.A.

FN3. Jerald Thompson is President of PDV-MR and Senior Vice-President in charge of information, technology, field and regulatory compliance, government and public affairs of CITGO. See 6/23/00 Thompson testimony at 33-34.

2. Unocal owned the Union 76 trademarks. Unocal brought marketing and refining assets to the UNO-VEN partnership and granted UNO-VEN a license to sell petroleum products in a specified 15-state area under the

Union 76 trademarks. PDV brought a crude oil supply agreement ("CSA") to the UNO-VEN partnership. See Plfs.' Ex. 1, Partnership Agreement; Plfs.' Ex. 2, Trademark License Agreement; 6/23/00 Jerald Thompson testimony at 34-36.

3. Armada is a distributor of petroleum products whose principal business is to purchase gasoline and other motor fuels from oil companies or "refiners" and distribute it to independent principal business retail gasoline stations for sale under the oil company or refiner's trademark or "brand," pursuant to a contractual arrangement with the oil company or refiner. See Plfs.' Ex. 3; 6/29/00 Allie Berry testimony at 211-14. [FN4]

FN4. The term "distributor" in the context of the petroleum industry is interchangeable with the terms "marketer" and jobber.

4. CITGOI s business includes the operation of the Lemont refinery and distribution/sale of gasoline to marketers. See 6/23/00 Thompson testimony at 53.

5. PDV-MR owns the Lemont refinery. PDV-MR's business includes

the refining and sale of gasoline for sale under trademark, including the CITGO trademark. See 6/23/00 Thompson testimony at 34, 52-53.

6. Both CITGO and PDV-MR are subsidiaries of Petroleos de Venezuela, S.A. See Plfs.' Ex. 5; 6/23/00 Thompson testimony at 53.

7. On March 31, 1997, Unocal sold the Union 76 trademarks along with all of Unocal's West Coast refining and marketing assets to Tosco Corporation ("Tosco"). See 6/23/00 Brian Conners testimony at 191-93 [FN5]; 6/23/00 Stephen J. Bednar testimony at 86 [FN6]; 6/23/00 Thompson testimony at 64-65. [FN7]

FN5. Brian Conners was employed at Unocal for the relevant period, and was one of the three Unocal representatives on UNO-VEN's executive committee. See 6/23/00 Conners testimony at 188.

FN6. Stephen Bednar is senior corporate counsel for CITGO. See 6/23/00 Bednar testimony at 75.

FN7. This finding is further buttressed by Unified Dealer Group v. Tosco Corp, 16 F. Supp.2d 1137 (N.D. Cal. 1998), wherein the court stated: "On

March 31, 1997, Tosco purchased from the Union Oil Company of California ("Union") the 76.Products Company, which included approximately 900 service stations in California. Tosco also acquired the exclusive right to use the 'Union 76' and '76' trademarks in perpetuity." Id. at 1139. In light of Thompson's, Bednar's and Conners' consistent testimony concerning the timing of the Tosco/Unocal transaction, as well as the published opinion set forth above, this Court finds that no significance attaches to Marty Sedlacek's unclear testimony regarding the date of the sale. See 6/23/00 Marty Sedlacek at 167-172.

B. The Franchise Relationship

1. Armada was a distributor and a franchisee as defined by the PMPA during the relevant period. See 15 U.S.C. § 2801(4). PDV-MR, CITGO, and UNO-VEN, were franchisors during the relevant period. See § 2801(3).

2. In 1990 Armada and UNO-VEN entered a Marketer Sales Agreement under which Armada became a distributor of UNO-VEN gasoline to be sold by retail gasoline stations under the "'Union 76" brand. See Plfs.'

Ex. 29-30, 1990 Marketer Sales Agreement; 6/29/00 Berry testimony at 211-12, 214-16.

3. In 1994, Armada acquired a jobbership under a second brand: British Petroleum ("BP"). BP and Armada agreed to a ten-year contract. See Plfs.' Ex. 226, 1994 Branded Jobber Agreement; 6/30/00 Berry testimony at 21.

4. On January .1, 1995, Armada and UNO-VEN entered into a Second Marketer Sales Agreement ("Agreement") whereby UNO-VEN agreed to supply petroleum product to Armada and Armada agreed to pay UNO-VEN for such product. See Stipulated Facts 10 and 12; Plfs.' Ex. 3., 1995 Marketer Sales Agreement; 6/29/00 Berry testimony at 215-16.

5. The duration of the Agreement was three years. The Agreement provided that a month-to-month renewal would continue upon termination of the three-year period until either: (a) a new agreement was executed, (b) Armada terminated on 90 days' written notice, or (c) UNO-VEN provided notice in accordance with the PMPA. The Agreement stated that UNO-VEN could terminate or non-renew the Agreement for any. of the reasons or causes permitted by the PMPA. See Stipulated Fact 11; Plfs.' Ex. 3.

6. The Agreement specified that Unocal granted a license to UNO-VEN to use the Union 76 trademark. See Plfs.' Ex. 3.

7. The Agreement further provided that UNO-VEN's rights and responsibilities were assignable. See Plfs.' Ex. 3.

C. PDV Purchases UNOCAL's Interest in UNO-VEN Partnership

1. In the early 1990s, PDV engaged in negotiations to buy out Unocal, its partner in UNO-VEN. See 6/23/00 Thompson testimony at 38-39. The partnership became an economic drain on PDV because the CSA contained a fixed margin provision that forced PDV to supply UNO-VEN with crude oil at a price substantially below prevailing market prices. See id. at 35, 37-38; 6/23/00 Marty Sedlacek testimony at 177-78. Negotiations did not advance because the partners were unable to agree on price terms for the buy-out. See 6/23/00 Thompson testimony at 38-39, 71. [FN8]

FN8. PDV and Unocal never reached an agreement as to the terms and conditions of a buy-out prior to the 1997 agreement because UNOCAL's asking

price for its 50% share in UNO-VEN was too high. See 6/23/00 Thompson testimony at 71.

2. In late 1996, early 1997, Unocal determined that it wanted to focus entirely on the upstream oil industry—exploration and extraction of oil--rather than downstream refining and marketing product--culminating in the December 26, 1996 Letter of Intent and the ultimate May 1, 1997 closing under the Partnership Interest Retirement Agreement. See 6/23/00 Conners testimony at 189-90, 203-04.

3. On December 26, 1996, PDV and Unocal entered into a nonbinding Letter of Intent ("LOI") concerning the negotiations for PDV's purchase of UNOCAL's 50% interest in UNO-VEN. The LOI stated that it was: ""not intended to represent or constitute a binding agreement between, or commitment on the part of PDV and UNOCAL with respect to the matters addressed." Plfs.' Ex. 5; 6/23/00 Thompson testimony at 38-41.

4. UNO-VEN's distributors, including Armada, received periodic updates concerning the progress of the negotiations set forth in the LOI. See 6/23/00 Thompson testimony at 44; Plfs.' Exs. 8-9 [FN9]; Plfs. Exs. 15-17. Armada acknowledges that it received these letters. See,

Stipulated Facts 15 and 16; 6/30/00Berry testimony at 26-28, 30-31.

> [FN9. Exhibit 8 is Armada's counsel's February 6, 1997 letter inquiring about the LOI and its implications for Armada. Exhibit 9 is CITGO's February 13, 1997 response,

5. At PDV's direction, CITGO began to conduct a due diligence on the proposal set forth in the LOI. See Plfs.' Ex. 6, January 6, 1997 Confidentiality Agreement; 6/23/00 Thompson testimony at 42-43.

6. UNO-VEN, CITGO and PDV (America) entered into a January 6,1997 Confidentiality Agreement setting forth terms of the due diligence inquiry. Under the Confidentiality Agreement, CITGO:

> agree[d] that it will use Confidential Information for the purpose of evaluating, negotiating, planning and preparing for implementation, and implementing the Transaction and that, as except as contemplated herein, it will not use any Confidential Information in connection with any sales activities (including pricing, costs and margins) or any other business

operations that may be in competition with UNO-VEN's business.

Plf s.' Ex. 6.

7. In March 1997, the negotiations between PDV and Unocal were suspended, primarily because of environmental issues that arose during the due diligence review. See 6/23/00 Thompson testimony at 44-46. The parties entered a "cooling-off" period for approximately 3-4 weeks. See id. at 45.

8. As set forth above, see Findings of Fact at A (7), on March 31, 1997, Unocal sold the Union 76 trademark and all of its West Coast refining and marketing assets to Tosco. See 6/23/00 Conners testimony at 191-93.

9. On April 11, 1997, PDV and Unocal reached an agreement and signed a Partnership Interest Retirement Agreement ("PIRA") , which outlined the UNO-VEN restructuring. The PIRA provided that the two UNO-VEN partners agreed that PDV would purchase all available motor fuel refining and marketing assets from UNO-VEN, thus expanding PDV's 50% interest in UNO-VEN's assets to 100%. See Stipulated Fact 13; Plfs.' Ex. 14, April 11, 1997 PIRA.

10. The PIRA authorized PDV to designate a party to operate UNO-VEN's assets and administer UNO-VEN's

Marketers Sales Agreements with its Union 76 distributors. PDV's designee was CITGO. See Stipulated Fact 13; Plfs.' Ex. 14.

11 The PIRA required that the parties execute an amendment to the Trademark Licensing Agreement prior to closing. See Plfs.' Ex. 14 at § 5.07; Plfs.' Ex. 23, Trademark License Amendment And Termination Agreement.

12. Under the PIRA, Unocal agreed that PDV could continue to use the Union 76 trademarks and credit card for all UNO-VEN distributors for one year after closing. See Plfs.' Ex. 14. Accord, Plfs.' Ex. 23 at § 14, amending § 8.01 of the License Agreement; Stipulated Fact 14.

13. The Trademark License Agreement in effect prior to this amendment provided, in part, that the license remained in effect perpetually unless it was terminated "by written mutual consent of the parties at any time." Plfs.' Ex. 2 at § 8.01(i). [FN10]

FN10. Although other bases existed to terminate the License Agreement, none of them are relevant to this case.

14. The parties executed a mutual written amendment consenting to the termination of the License Agreement. See Plfs.' Ex. 23.

15. The Trademark License Agreement Amendment And Termination Agreement, dated April 30, 1997, was executed by UNO-VEN, Unocal, PDV--R, and CITGO. See Plfs.' Ex. 23.

16. On May 1, 1997, the UNO-VEN restructuring closed, with approval of UNOCAL's and PDV's boards of directors. See 6/23/00 Thompson testimony at 48-49; Plfs.' Exs. 19-21. As a result, PDV paid Unocal $250 million to become the sole owner of UNO-VEN's refining and marketing assets. See 6/23/00 Thompson testimony at 48-49; 6/23/00 Conners testimony at 191-193.

17. As of May 1, 1997, CITGO operated UNO-VEN's assets, including the Lemont, Illinois refinery, to provide Union 76 branded product to UNO-VEN distributors, such as Armada, through May 1, 1998. See Stipulated Facts 27 and 28; 6/23/00 Thompson testimony at 52-53.

D. Correspondence Concerning UNO-VEN Restructure

1. As set forth above, UNO-VEN's distributors, including Armada, received periodic updates concerning the progress of the negotiations set forth in the LOI. See, e.g., Stipulated Facts 15 and 16; 6/23/00 Thompson testimony at 44; 6 /30/00 Berry testimony at 26-28, 30-31; Plfs.' Exs. 8-9 and 15-17.

2. CITGO sent Armada a letter dated April 18, 1997, informing Armada of the April 11, 1997 PIRA. See Plfs.' Ex. 15; Stipulated Fact 15.

3. CITGO's letter indicated that as of May 1, 1997, "UNOVEN's refining and marketing assets will be transferred to an indirect subsidiary of Petroleos de Venezuela, S.A. [Plaintiff PDV]" Plfs.' Ex. 15.

4. The April 18 letter also states:

> . . . there will be a twelve (12) month transition period in which CITGO has agreed to supply [Union 76] branded petroleum products to [Armada]. During this transition period, [Armada] will be able to continue to use the [Union 76] Marks, and accept the Union 76 credit card. During this transition period, [Armada's] UNO-VEN agreements will continue in place and be administered by CITGO.

Plfs.' Ex. 15; Stipulated Fact 15.

5. In CITGO's subsequent April 21, 1997 letter to Armada, CITGO requested Armada to complete CITGO's Electronic Funds Transfer Agreement ("EFT") in order to "facilitate an uninterrupted supply on the closing date [of the UNO-VEN/PDVMR Contract] and assure the accurate and timely processing of CITGO's EFT." Plfs.' Ex. 17; Stipulated Fact 16.

6. The EFT authorized CITGO and/or its affiliates "to initiate electronic entries to [Armada's] bank account. . . and further directs [the bank] to accept and debit/credit the amount of such entries to [Armada's] Account." Plfs.' Ex. 18; Stipulated Fact 17.

7. UNO-VEN's April 21, 1997 letter to Armada referenced the expected May 1, 1997 closing date between Unocal and PDV-MR and encouraged a prompt return of CITGO's EFT application. The letter indicated that during the twelve-month transition period after the closing: "you will continue to receive Unocal branded petroleum products and be able to use the [Union] 76 Marks. The products will be supplied to you by CITGO Petroleum Corporation, which will become the operator of the UNO-VEN refinery, terminals and lubricant facilities as of the closing." Plfs.' Ex. 16.

8. Armada returned an executed EFT to CITGO on April 25, 1997. Berry signed the EFT on behalf of Armada. See Stipulated Fact 17; Plfs.' Ex. 18.

9. CITGO processed Armada's EFT on April 29, 1997. Stipulated Fact 18.

10. UNO-VEN sent an April 30, 1997 letter ("Notice of Termination" or "Notice") to Armada, addressed to Berry, reiterating the facts supplied in CITGO's April 18th letter. See Stipulated Facts 19 and 25. This letter served as notification of termination under the PMPA. See Stipulated Facts 19-25. The Notice provided, in relevant part:

> On April 11, 1997, the owners of The UNOVEN Company ("'UNOVEN") entered into a definitive agreement for the distribution of the refining and marketing assets of the company to an indirect wholly-owned subsidiary of Petroleos de Venezuela, S.A.; which will become the owner of those assets. The transaction is scheduled to close on May 1, 1997. Because Unocal will no longer have an interest in the refining and marketing assets, UNOVEN's right to use the Unocal and 76 trademarks and credit card will be terminated.

UNOVEN's general offices will be closed following completion of the transaction and its employees will be separated from the company. UNOVEN will cease to operate as an ongoing refining and marketing company.

The asset purchaser has designated its affiliate CITGO Petroleum Corporation ("CITGO") to administer the orderly termination of UNOVEN's contracts with customers. A termination notice period of one year after the closing of the transaction for continued use of the Unocal and 76 trademarks and credit card was negotiated as part of the transaction. CITGO will continue Unocal and 76 branded supply under your current agreements for the one-year period following closing of the transaction. You will be contacted by a CITGO representative concerning ongoing operation of your marketership during the one year termination notice period.

Please refer to your Marketer Sales Agreement dated 1/1/95. As a consequence of the transaction described above, and as a result of the termination

of UNOVEN's right to use the Unocal and 76 trademarks and credit card, UNOVEN hereby terminates and/or non-renews said Marketer Sales Agreement and does hereby terminate and/or non-renew any franchise relationship, effective as of May 1, 1998, one year from today's date. All agreements relating to the Marketer Sales Agreement are also hereby terminated and non-renewed as of the effective date, May 1, 1998.

In compliance with the provisions of the Petroleum Marketing Practices Act, you are hereby notified that the grounds for the above action are that:

1. An event has occurred which is relevant to the franchise relationship and as a result of which termination of the franchise and nonrenewal of the franchise relationship is reasonable.

2. UNOVEN has lost the right to grant the use of the trademark which is the subject of the franchise.

If you have any questions concerning this notice, please call Bob Butler at (847) 7183.

Stipulated Fact 19; Plfs.' Ex. 22.

11. The April 30, 1997 letter was posted by certified mail to Armada. Armada received the letter. See Stipulated Fact 20 and 25; Plfs.' Ex. 22.

12. On May 1, 1997, the UNO-VEN restructuring closed. CITGO began operating UNO-VEN's assets, including the Lemont, Illinois refinery, to provide Union 76 branded product to UNO-VEN distributors, such as Armada, through May 1, 1998. See Stipulated Facts 27 and 28.

13. Armada accepted petroleum products from CITGO subsequent to May 1, 1997. See Stipulated Fact 29.

14. Berry, on behalf of Armada, sent a memorandum to some of its customers indicating that Armada's franchise agreement with UNO-VEN was terminated on May 1, 1997, not the May 1, 1998 date provided in CITGO's and UNO-VEN's letters: "By now you should be aware that UNO-VEN 76 franchise agreement(s) were terminated effective May 1, 1997. The announcement of the UNO-VEN restructuring its refining and marketing assets by PDVSA U.S. were completed

effective May, 1997." Plfs.' Ex. 24; Stipulated Fact 40. [FN11]

FN11. There is conflicting testimony concerning how many Armada dealers received this letter. Armada contends that not all of its dealers received the letter, but concedes that at least some did. See,.e.g., 6/30/00 Berry testimony at 41-43. Because this determination is irrelevant to the disposition of this case, the Court finds it unnecessary to determine how many dealers received this letter. Berry testified that at some point he realized that the information contained in his letter was .incorrect. See id. at 42-44.

15. Armada's memorandum also provided:

Most important is our position that UNO-VEN's statement for terminating your franchises, "loss of right to grant the use of the trademark which is the subject of the franchise."

The, most important aspect of this memo is to urge you NOT to sign any agreement with any

> competitor before you talk to us, for entering into a new BP franchise.
>
> Effective May 15, 1997, we (Armada Oil & Gas Co.) will not accept UNO-VEN or other credit cards processed thru UNO-VEN POS machines. . .

Plts.' Ex. 24.

16. Berry testified that shortly after, he sent this letter regarding the termination to some Armada-supplied dealers, he became aware that there were two separate April 30, 1997 letters, and that dealers continuing to operate as Union 76 dealers during the 12-month transition period could continue to accept Union 76 credit cards. 6/30/00 Allie Berry testimony at 40; compare Plfs.' Ex. 22 with Defs.' Ex. A. [FN12]

> FN12. The second April 30, 1997 letter referenced unbranded UNO-VEN contracts, stating at the beginning of the letter, in bold: "**Re: UNO-VEN Unbranded Products Contract**" Defs.' Ex. A (emphasis in original).

17. Armada's franchise with UNO-VEN was terminated effective May 1, 1998. See Stipulated Fact 41.

IV. CONCLUSIONS OF LAW

1. The UNO-VEN Marketer Sales Agreement created a franchise agreement, which may be terminated only in accordance with the PMPA.

2. The PMPA was enacted "to protect franchisees from arbitrary or discriminatory termination or non-renewal of their franchises." Massey v. Exxon Co, 942 F.2d 340, 342-43 (6th Cir. 1991) (citing Brach v. Amoco Oil Co., 677 F.2d 1213, 1216 (7th Cir. 1982)) (internal quotation marks omitted).

3. In enacting the PMPA, Congress recognized "the importance of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions." S. Rep. No. 95-731, 95th Cong., 2d Sess. 15, reprinted in 1978 U.S.C.C.A.N. 873, 877. Thus, the Sixth Circuit has cautioned that the PMPA "constitute[s] a diminution of the property rights of franchisers and thus should not be interpreted to reach beyond its original language and purpose." May~Som Gulf, Inc. v. Chevron U.S.A., Inc., 869 F.2d 917, 921 (6th Cir. 1989) (citation omitted).

[FN13] The Court thus balances the competing interests in resolving a claim brought under the PMPA.

> FN13. The Court is thus mindful that "in an age of increasing corporate competition, the major firms must retain the freedom to seek greater economic efficiency through corporate reorganizations, mergers, and acquisitions." May-Som, 869 F.2d at 921.

4. The PMPA allows a franchisor to terminate or not renew a franchise based on certain enumerated grounds, provided that the termination also complies with PMPA's notice provisions. See 15 U.S.C. §§ 2802(b) & 2804.

5. Defendants, as the franchisee, have the initial burden of showing that the franchise has been terminated or not renewed. Massey, 942 F.2d at 342-43; Evans v. Marathon Oil Co., 1999 WL 137633 at *2 (6th Cir. Mar. 2, 1999) accord 15 U.S.C. § 2805(c). The burden then shifts to Plaintiffs, as the franchisor, to establish as an affirmative defense that such termination or nonrenewal was permissible under the PMPA. See id.

6. It is uncontroverted that Armada's franchise was terminated, and thus Defendants satisfy their initial burden. Accordingly, Plaintiffs must establish that the termination was permissible under the PMPA.

7. The PMPA lists the affirmative defenses available to a franchisor. See 15 U. S.C. § 2802(b)(2) and (b)(3). Section 2802(b)(2) provides, in relevant part:

> (2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship. . .
>
> (C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence
>
> (i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification 'is

given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804 (b) (1) of this title..

§ 2802(b)(2)(C).

8. Section 2802(c) provides twelve events that constitute events "relevant to the franchise relationship and as a result of which termination of the franchise . . . is reasonable" consistent with § 2802(b)(2)(C)'s requirements. The list is not exhaustive. See, e.g., Russo v. Texaco, Inc., 808 F.2d 221, 225 (2d Cir. 1986) (citations omitted) Courts may not deem the events expressly included in § 2802 (c) as presumptively reasonable; rather, courts must scrutinize the reasonableness of terminations even when an event enumerated in § 2802 (c) has occurred." Marathon Petroleum Co. v. Pendleton, 889 F.2d 1509, 1512 (6th Cir. 1989)

9. The Notice identified two separate grounds purportedly justifying the termination under the PMPA:

In compliance with the provisions of the [PMPA], you are hereby notified that the grounds for the

[termination of the Agreement effective May 1, 1998] are that:

1. An event has occurred which is relevant to the franchise relationship and as a result of which termination of the franchise and non-renewal of the franchise relationship is reasonable.
2. UNOVEN has lost the right to grant the use of the trademark which is the subject of t franchise.

Plf s.' Ex. 22. [FN14] Plaintiffs maintain that the UNO-VEN restructuring and the loss of the Union 76 trademarks constitute two separate bases for termination.

FN14. Plaintiffs further suggest that they could have terminated Armada for reasons other than those stated in their April 30, 1997 Notice, such as Armada's failure to pay for some of the gasoline it received, and Armada's purported failure to meet contractual volume requirements after May 1, 1997. The Court finds, however, that these additional reasons are not relevant to the dispute at issue. Plaintiffs must identify allreasons for the termination in the termination notice. Termination under the PMPA cannot be premised on reasons not

articulated in the notice. See 15 U.S.C. 2804(c)(3)(A); O'Shea v. Amoco Oil Cc., 886 F.2d 584, 597-98 (3d Cir. 1989)(ruling that franchisor may not assert new reasons for the termination not provided in notice of termination).

10. In order to prevail, Plaintiffs need only demonstrate that one of its two bases for termination was proper under the PMPA. See Thompson v. Amoco Oil Co., 903 F.2d 1118, 1120, 1122 (7th Cir. 1990). Accord, Baker v. Amoco Oil Co., 761 F. Supp. 1386, 1391-92 (E. D. Wisc. 1991)(noting neither case law nor statutory authority requires "a franchisor to delineate each and every reason for termination or nonrenewal."); Esquivel v. Exxon Co., 700 F. Supp. 890, 893 (W.D. Tex. 1988)(ruling that if one of franchisor's "reasons is legitimate, or true, the fact that the other reasons are somehow defective will not affect . . . nonrenewal" under the PMPA)." [FN15]

FN15. Defendants argue that the "loss" of the trademark rights was a consequence of the restructuring, and does not constitute a separate reason for termination under the PMPA. Regardless of whether this Court construes Plaintiffs' reason as

a single reason or two separate reasons, it is uncontroverted that Plaintiffs must establish only one valid reason to prevail. See Thompson, 903 F.2d at 1120-22; Baker, 761 F. Supp. at 1391-92; Esquivel, 700 F. Suppa at 893.

11. Defendants acknowledge that Plaintiffs' Notice cites two reasons for termination under the PMPA. Defendants maintain, however, that the two reasons are identical and should therefore be considered one reason. The Court finds that although the reasons are closely related, they are nevertheless distinct. Under the PIRA, UNO-VEN's internal structure was drastically altered. One partner, Unocal, sold its 50% interest to its partner; thus PDV assumed 100% ownership of UNO-VEN's assets. Under the restructuring, UNO-VEN's trademark license agreement was terminated. All current UNO-VEN distributors were allowed to continue using the Union 76 trademarks for a one-year period after the PIRA was closed, until May 1, 1998.

12. The fact that Plaintiffs may have had other plans or expectations does not establish that its termination was based on, sham or pretext provided that the reason asserted by Plaintiffs is valid and proper under the PMPA.

See, e.g., Baker, 761 F. Supp. at 1391; Gruber v. Mobil Oil Corp., 570 F. Supp. 1088, 1096 and n.16 (E.D. Mich. 1983).

13. Defendants failed to produce evidence that the reasons provided in the April 30, 1997 letter were not legitimate grounds upon which termination could be predicated. It is uncontroverted that the PIRA and Trademark License Agreement Amendment And Termination Agreement altered UNO-VEN's structure, resulting in PDV assuming 100% ownership and terminating UNO-VEN's (and thus PDV's) license and ability to use the Union 76 trademarks. It is also undisputed that Unocal sold the Union 76 trademarks to Tosco.

14. A franchisee may rebut a franchisor's grounds for termination by producing evidence that the termination was based on illegitimate considerations. See Reyes v. Atlantic Richfield Co., 12 F.3d 1464, 1469-70 (9th Cir. 1993) Defendants' charge of "pretext" fails. Even if this Court accepted Defendants' claim of a hidden reason for the discharge, the hidden reason itself is a legitimate basis for terminating a franchise: Withdrawal from the geographic market. See 15 U.S.C. § 2802(b)(1)(E).

15. Defendants failed to produce evidence that would either directly or by inference establish that

Plaintiffs wanted to avoid complying with the PMPA's notice requirements for withdrawal from the geographic market and chose to manufacture other reasons to justify the termination. [FN16]

> FN16. As set forth in this Opinion, Defendants did not present evidence establishing that Plaintiffs withdrew from the geographic market in this case. PDV-MR has not withdrawn from the marketing of motor fuel in Michigan. The parties acknowledge that PDV-MR continues to market motor fuel under the CITGO brand—a brand other than Union 76.

16. Plaintiffs assert that termination is proper and reasonable due to the restructuring of the UNO-VEN partnership, pursuant to the May 1, 1997 closing—an event they contend is "relevant to the franchise relationship and as a result of which termination of the franchise . . . is reasonable." § 2802(b)(2)(C). This Court agrees.

17. Although a business restructuring is not among the twelve events enumerated in § 2802 (c), as this Court noted above, this list is not exhaustive.

18. If a franchisor bases termination on a non-enumerated ground, this Court carefully scrutinizes the

reasonableness of the termination to determine whether the business decision was made in good faith and in the normal course of business. See, e.g., Marathon Petroleum, 889 F.2d at 1312 (noting that even if the event is enumerated under § 2802(c), the court must scrutinize the reasonableness of the termination); Brach v. Amoco Oil Co., 677 F.2d 1213, 1222-23 (7th Cir. 1982). This inquiry involves a subjective inquiry into the franchisor's good faith, as well as a determination of whether the franchisor's decision to terminate was made in the normal course of business. See Brach, 677 F.2d at 1222-23 (internal citations omitted). Thus, courts do not determine whether a given business decision is wise. Id. at 1223. This test is designed to protect a franchisee from arbitrary or discriminatory terminations, yet avoids an inquiry into the soundness of legitimate business decisions of a franchisor. Id. at 1222-23.

19. This Court finds that the restructuring of the UNO-VEN partnership was negotiated and undertaken in good faith in the normal course of business for valid economic reasons, articulated at trial. In an arms-length transaction that closed on May 1, 1997, PDV paid approximately $250 million to Unocal for its share of UNO-VEN's assets. The transaction was undertaken for

legitimate reasons by both parties. The evidence at trial established that UNO-VEN was an economic drain on PDV, and Unocal had decided to exit the marketing segment of the oil business altogether. Termination of the UNION 76 franchises was necessary because, as the Notice indicated, as a result of the restructuring, UNO-VEN terminated its employees and ceased to operate as a marketing and refining company. The evidence also established that Unocal no longer had an economic reason to continue to grant UNO-VEN or PDV a license to use the UNION 76 trademarks in light of Unocal's decision to sell its ownership interest in UNO-VEN and exit the downstream market throughout the country. The evidence additionally established that Unocal sold the UNION 76 trademarks to Tosco along with all of Unocal's West Coast refining and marketing assets.

20. As noted above, Armada did not adduce any evidence at trial to establish that UNO-VEN's restructuring was a sham or intended to be deleterious to Armada or any other franchisee. The LOI and the PIRA explicitly addressed the obligation to comply with the PMPA. The evidence at trial also showed that PDV retained an outside law firm with PMPA expertise to accomplish this requirement. Further, the record

establishes that UNO-VEN went beyond the PMPA's minimum requirements in an effort to accommodate its terminated franchisees: It is uncontroverted that Plaintiffs provided all UNO-VEN distributors, including Armada, with UNION 76 product and continued their franchises until May 1, 1998—a full year after UNO-VEN's April 1997 notice of termination--when the PMPA requires only 90 days' notice prior to termination. See 15 U.S.C.A. § 2804(a)(2). Granting all its distributors a full year to make arrangements, a period much greater than required under the PMPA, is compelling evidence that Plaintiffs' decision to restructure its business was undertaken in good faith. There is no evidence to suggest that Plaintiffs acted in an arbitrary or discriminatory manner. All distributors received the one-year extension in an attempt to avoid disruptions in their respective businesses. See Siecko v. Amerada Hess Corp., 569 F. Supp. 768, 771-72 (E.D. Pa. 1983) (finding that a franchisor had acted in good faith because "this is not a case where the business judgment rationale can be viewed as a mere pretext for discriminatory treatment since there is nothing to dispute [franchisor's] proof that all stations were evaluated in the same way").

21. For all these reasons, this Court finds that the UNO-VEN restructuring was an event relevant to the franchise relationship and a result of which termination of the franchise was reasonable. The Court also finds, for the reasons set forth later in this Opinion, that Plaintiffs' notice of termination was timely under the PMPA.

22. Plaintiffs also maintain that termination is proper due to the loss of the use of the 76 trademarks. [F17] Unocal sold the Union 76 trademarks to Tosco effective March 31, 1997. Under the PIRA and the Trademark License Agreement Amendment And Termination Agreement, Plaintiffs were granted a one-year license, until May 1, 1998, to use the 76 trademarks. The loss of right to use a trademark is specifically enumerated under § 2802(c)(6):

> (6) loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise, unless such loss was due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor. . . .

FN17. As this Court previously noted, under the PIRA, UNO-VEN's internal structure was drastically altered. As part of restructuring, UNO-VEN's trademark license agreement was terminated. Furthermore, Unocal sold its trademark rights to Tosco, and thus was not in a position to renew a license. In agreement for the trademarks. These factors, in combination, resulted in the loss of the right to use the 76 trademark

23. This Court previously held that a voluntary divestiture of a trademark qualifies as a loss under § 2802 (c) (6). See October 1, 1999 Order at 22-27. In addition for the reasons set forth above, relating to the UNO-VEN restructuring, this Court finds that the loss of the trademark constitutes a valid and reasonable business decision. The evidence at trial established that UNO-VEN did not own the trademarks—Unocal granted a license to use the trademarks in 15 states. Unocal made an independent decision to sell the trademarks and its West Coast marketing and refining assets to Tosco. Defendants did not produce any evidence establishing that Unocal's and Tosco's business transaction was anything other than an arms-length transaction. Similarly, Defendants did not present evidence establishing that UNO-VEN's, PDV's and

UNOCAL's decision to retire the trademark license in conjunction with the PIRA was unreasonable or undertaken in bad faith. To the contrary, the evidence presented at trial established that Plaintiffs engaged in an arms-length business transaction. There was no evidence that Plaintiffs' decision was ill-motived or an arbitrary exercise of power. As such, the evidence supports only one conclusion: That termination based on the loss of the ability to use the Union 76 trademarks was reasonable. The Court cannot, and will not, supplant Plaintiffs' assessment of a legitimate business decision with the Court's assessment.

24. Finding that Plaintiffs' grounds for terminating the franchise constituted good faith business decisions undertaken in the ordinary course of business, the Court next determines whether Plaintiffs complied with the PMPA's notice provisions. Plaintiffs' April 30, 1997 letter to Armada constituted a notice of termination under the PMPA.

25. A notice under the PMPA must: (1) be written, (2) be posted by certified mail or personally delivered, (3) state an intention to terminate along with the reason or reasons for termination, (4) specify the date on which termination will take effect and (5) contain the Secretary of

Energy's summary statement describing the PMPA which is published in the Federal Register. See § 2804(a) and (c).

26. The April 30, 1997 notice letter ("Notice") was posted by certified mail to Armada and contained: (a) a statement of intention to terminate the franchise, (b) the grounds of termination, (c) the effective date of the termination and (d) the Secretary of Energy's summary statement describing the PMPA. See Stipulated Fact 20. Thus, Plaintiffs' Notice is in compliance with § 2804, PMPA's notice provision.

27. Under the PMPA's notice provision, notice of termination must be provided "not less than 90 days prior to the date on which such termination or nonrenewal takes effect." § 2804(a). It is uncontroverted that this requirement was satisfied, as the termination became effective on May 1, 1998, one year after the date of the notice. See Stipulated Fact 21.

28. Plaintiffs' Notice was given pursuant to § 2802(b)(2)(C) and, as such, can be based only on events occurring not more than 120 days prior to the notice of termination. This provision states, in relevant part:

> The occurrence of an event which is relevant to the franchise relationship and as a result of which

termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchiser ' first acquired actual or constructive knowledge of such occurrence--

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title ....

§ 2802(b)(2)(C)(i). [FN18]

FN18. The time limitations of the PMPA are intended to preclude a franchisor from basing termination upon "old and long forgotten events." See Gruber v. Mobil Oil Corip., 570 F. Supp. 1088, 1092 (E.D. Mich. 1983)(quoting S.Rep. No. 95-731, 95th Cong., 2d Sess. 15, reprinted in 1978 U.S.C.C.A.N. 873, 892).

29. Plaintiffs' Notice was given on April 30, 1997. Accordingly, Plaintiffs must not have acquired knowledge of the loss of the right to use the trademark prior to December 30, 1996.

30. Similarly, Plaintiffs must not have acquired knowledge of the UNO-VEN restructuring prior to December 30, 1996.

31. The evidence establishes that Tosco purchased UNOCAL's trademark rights on March 30, 1997. Thus, the termination was timely under § 2802(C)(i).

32. The notice was timely as it related to the UNO-VEN restructuring. Defendants contend that the termination was untimely, arguing that the rumors concerning a possible deal or the LOI should be regarded as the triggering event. The Court rejects Defendants' contention. Prior to the PIRA, Plaintiffs had not entered into a binding agreement. Thus, general "talks" concerning a possible restructuring, absent a binding agreement, could not provide a basis for terminating the franchise agreement. The basis for termination was provided in the PIRA. The PIRA was executed on April 11, 1997, and ultimately closed, with the approval of Unocal's and PDV's board of directors on May 1, 1997. The notice was timely as measured by the PIRA.

33. Based on the foregoing, this Court finds that the April 30, 1997 Notice satisfied the PMPA's notice requirements. Furthermore, because the Court found that Plaintiffs' voluntary divestiture of the Union 76 trademarks

qualifies as a loss under § 2802(c)(6), and the Court found that the decision to terminate based on the UNO-VEN restructuring and the voluntary divestiture of the trademark constitute a reasonable and ordinary business judgment consistent with the PMPA, see Marathon Petroleum, 889 F.2d at 1512, the Court thus concludes that Plaintiffs did not violate the PMPA when it terminated its franchiseE-7

V. CONCLUSION

In conclusion, the Court holds that Plaintiffs have established that the termination of Defendants' jobbership fully complied with the PMPA. Accordingly, Defendants are not entitled to the relief they requested, and judgment must be entered for Plaintiffs

IT IS SO ORDERED:

[signature] ..

HON. GEORGE E. WOODS

UNITED STATES DISTRICT JUDGE

FILED
SEPT 3, 2000

Eastern District
of Michigan

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN FINAL JUDGMENT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PDV MIDWEST REFINING LLC,and CITGO PETROLEUM CORPORATION, Individually and as administrator Of the Uno-Ven Marketer Agreements,

Plaintiffs and Counter-Defendants,

v.

ARMADA OIL & GAS COMPANY, INC., ALLIE BERRY, ALI K. JAWAD, and SAM HADDAS,

Defendants, Counterplaintiffs And Third Party Plaintiffs.

HON. GEORGE E. WOODS

Case No. 97-72287

/

FINAL JUDGMENT

Approved as to Form

In accordance with this Court's Order Granting in Part and Denying in Part Plaintiffs' Motion for Summary Judgment dated October 1, 1999; the Settlement Agreement and Releases between the parties dated June 16, 2000; the Stipulation of Partial Final Judgment filed on June 23, 2000; and this Court's Memorandum Opinion and Order Containing the Court's Findings of Fact and Conclusions of Law dated October 3, 2000, entered after a bench trial on Defendants' counterclaim under the Petroleum Marketing Practices Act, it is hereby

ORDERED, ADJUDGED AND DECREED that Plaintiffs CITGO Petroleum Corporation and PDV Midwest Refining LLC (collectively, "Plaintiffs") recover from Defendants Armada Oil and Gas Company, Inc., Allie Berry, Ali K. Jawad and Sam Haddas (collectively, "Defendants") the amount of $3,015,387.13 on Counts I and III of the Verified Complaint, plus prejudgment interest of 5% per year ($12,564.11 per month) from June

27, 1997 through the date of judgment set forth below, post judgment interest pursuant to 28 U.S.C. § 1961, and costs pursuant to Federal Rule of Civil Procedure 54(d)(1); that final judgment is entered in favor of Plaintiffs on Defendants' counterclaim under the Petroleum Marketing Practices Act; and that no other claims or counterclaims in this action remain to be adjudicated.

Dated: November 30, 2000

APPROVED AS TO FORM

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SO ORDERED
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Hon. George E. Woods, U.S.D.J

FILED
NOV 30, 2000

Eastern District
of Michigan

V. STATUTES

The Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801—2806

15 U.S.C. § 2901. Definitions

As used in this subchapter:

(1)(A) The term "franchise" means any contract —

(i) between a refiner and a distributor,

(ii) between a refiner and a retailer,

(iii) between a distributor and another distributor, or

(iv) between a distributor and a retailer, under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use.

(B) The term "franchise" includes —

(i) any contract under which a retailer or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy;

(ii) any contract pertaining to the supply of motor fuel which is to be sold, consigned or distributed —

(I) under a trademark owned or controlled by a refiner; or

(II) under a contract which has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, motor fuel was sold, consigned or distributed under a trademark owned or controlled on such date by a refiner; and

(iii) the unexpired portion of any franchise, as defined by the preceding provisions of this paragraph, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) The term "franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.

(3) The term "franchisor" means a refiner or distributor (as the case may be) who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with thesale, consignment, or distribution of motor fuel.

(4) The term "franchisee" means a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(5) The term "refiner" means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.

(6) The term "distributor" means any person, including any affiliate of such person, who —

(A) purchases motor fuel for sale, consignment, or distribution to another; or

(B) receives motor fuel on consignment for consignment or distribution to his own motor fuel accounts or to accounts of his supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

(7) The term "retailer" means any person who purchases motor fuel for sale to the general public for ultimate consumption.

(8) The term "marketing premises" means, in the case of any franchise, premises which, under such franchise, are to be employed by the franchisee in connection with sale, consignment, or distribution of motor fuel.

(9) The term "leased marketing premises" means marketing premises owned, leased, or in any way controlled by a franchisor and which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of motor fuel.

(10) The term "contract" means any oral or written agreement.

For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels.

(11) The term "trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(12) The term "motor fuel" means gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

(13) The term "failure" does not include —

(A) any failure which is only technical or unimportant to the franchise relationship;

(B) any failure for a cause beyond the reasonable control of the franchisee; or

(C) any failure based on a provision of the franchise which is illegal or unenforceable under the law of any State (or subdivision thereof).

(14) The terms "fail to renew" and "nonrenewal" mean, with respect to any franchise relationship, a failure to reinstate, continue, or extend the franchise relationship —

(A) at the conclusion of the term, or on the expiration date, stated in the relevant franchise;

(B) at any time, in the case of the relevant franchise which does not state a term of duration or an expiration date; or

(C) following a termination (on or after June 19, 1978) of the relevant franchise which was entered into prior to June 19, 1978, and has not been renewed after such date.

(15) The term "affiliate" means any person who (other than by means of a franchise) controls, is controlled by, or is under common control with, any other person.

(16) The term "relevant geographic market area" includes a State or a standard metropolitan statistical area as periodically established by the Office of Management and Budget.

(17) The term "termination" includes cancellation.

(18) The term "commerce" means any trade, traffic, transportation, exchange, or other commerce —

(A) between any State and any place outside of such State; or

(B) which affects any trade, transportation, exchange, or other commerce described in subparagraph (A).

(19) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and any other commonwealth, territory, or possession of the United States.

(Pub.L. 95-297, title I, Sec. 101, June 19, 1978, 92 Stat. 322; Pub.L. 103-371, Sec. 6, Oct. 19, 1994, 108 Stat. 3486.)

15 U.S.C. § 2802. Franchise relationship

(a) General prohibition against termination or nonrenewal

Except as provided in subsection (b) of this section and section 2803 of this title, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may —

(1) terminate any franchise (entered into or renewed on or after June 19, 1978) prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was entered into or renewed).

(b) Precondition and grounds for termination or nonrenewal

(1) Any franchisor may terminate any franchise (entered into or renewed on or after June 19, 1978) or may fail to renew any franchise relationship, if —

(A) the notification requirements of section 2804 of this title are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:

(A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or constructive knowledge of such failure —

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

(B) A failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, if —

(i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions; and

(ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 2804 of this title.

(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence —

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

(D) An agreement, in writing, between the franchisor and the franchisee to terminate the franchise or not to renew the franchise relationship, if —

(i) such agreement is entered into not more than 180 days prior to the date of such termination or, in the case of nonrenewal, not more than 180 days prior to the conclusion of the term, or the expiration date, stated in the franchise;

(ii) the franchisee is promptly provided with a copy of such agreement, together with the summary statement described in section 2804(d) of this title; and

(iii) within 7 days after the date on which the franchisee is provided a copy of such agreement, the franchisee has not posted by certified mail a written notice to the franchisor repudiating such agreement.

(E) In the case of any franchise entered into prior to June 19, 1978, and in the case of any franchise entered into or renewed on or after such date (the term of which is 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel

through retail outlets in the relevant geographic market area in which the marketing premises are located, if —

(i) such determination —

(I) was made after the date such franchise was entered into or renewed, and

(II) was based upon the occurrence of changes in relevant facts and circumstances after such date;

(ii) the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises —

(I) the franchisor, during the 180-day period after notification was given pursuant to section 2804 of this title, either made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises; or

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by

such other person or franchises then in effect and with respect to which such other person is the franchisor.

(3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

(A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if —

(i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and

(ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for the benefit of the franchisor or otherwise preventing the renewal of the franchise relationship.

(B) The receipt of numerous bona fide customer complaints by the franchisor concerning the franchisee's operation of the marketing premises, if —

(i) the franchisee was promptly apprised of the existence and nature of such complaints following receipt of such complaints by the franchisor; and

(ii) if such complaints related to the condition of such premises or to the conduct of any employee of such franchisee, the franchisee did not promptly take action to cure or correct the basis of such complaints.

(C) A failure by the franchisee to operate the marketing premises in a clean, safe, and healthful manner, if the

franchisee failed to do so on two or more previous occasions and the franchisor notified the franchisee of such failures.

(D) In the case of any franchise entered into prior to June 19, 978, (the unexpired term of which, on such date, is 3 years or longer) and, in the case of any franchise entered into or renewed on or after such date (the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business, if —

(i) such determination is —

(I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(II) to materially alter, add to, or replace such premises,

(III) to sell such premises, or

(IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee;

(ii) with respect to a determination referred to in subclause (II) or (IV), such determination is not made for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 2804 of this title, either —

(I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or

(II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises.

(c) Definition

As used in subsection (b)(2)(C) of this section, the term "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as —

(1) fraud or criminal misconduct by the franchisee relevant to the operation of the marketing premises;

(2) declaration of bankruptcy or judicial determination of insolvency of the franchisee;

(3) continuing severe physical or mental disability of the franchisee of at least 3 months duration which renders the franchisee unable to provide for the continued proper operation of the marketing premises;

(4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease, if —

(A) the franchisee was notified in writing, prior to the commencement of the term of the then existing franchise —

(i) of the duration of the underlying lease; and

(ii) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of nonrenewal);

(B) during the 90-day period after notification was given pursuant to section 2804 of this title, the franchisor offers to assign to the franchisee any option to extend the underlying lease or option to purchase the marketing premises that is held by the franchisor, except that the franchisor may condition the assignment upon receipt by the franchisor of —

(i) an unconditional release executed by both the landowner and the franchisee releasing the franchisor from any and all liability accruing after the date of the assignment for —

(I) financial obligations under the option (or the resulting extended lease or purchase agreement);

(II) environmental contamination to (or originating from) the marketing premises; or

(III) the operation or condition of the marketing premises; and

(ii) an instrument executed by both the landowner and the franchisee that ensures the franchisor and the contractors of the franchisor reasonable access to the

marketing premises for the purpose of testing for and remediating any environmental contamination that may be present at the premises; and

(C) in a situation in which the franchisee acquires possession of the leased marketing premises effective immediately after the loss of the right of the franchisor to grant possession (through an assignment pursuant to subparagraph (B) or by obtaining a new lease or purchasing the marketing premises from the landowner), the franchisor (if requested in writing by the franchisee not later than 30 days after notification was given pursuant to section 2804 of this title), during the 90-day period after notification was given pursuant to section 2804 of this title —

(i) made a bona fide offer to sell, transfer, or assign to the franchisee the interest of the franchisor in any improvements or equipment located on the premises; or

(ii) if applicable, offered the franchisee a right of first refusal (for at least 45 days) of an offer, made by another person, to purchase the interest of the franchisor in the improvements and equipment.

(5) condemnation or other taking, in whole or in part, of the marketing premises pursuant to the power of eminent domain;

(6) loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise, unless such loss was due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor;

(7) destruction (other than by the franchisor) of all or a substantial part of the marketing premises;

(8) failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled;

(9) failure by the franchisee to operate the marketing premises for —

(A) 7 consecutive days, or

(B) such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(10) willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations by the franchisee;

(11) knowing failure of the franchisee to comply with Federal, State, or local laws or regulations relevant to the operation of the marketing premises; and

(12) conviction of the franchisee of any felony involving moral turpitude.

(d) Compensation, etc., for franchisee upon condemnation or destruction of marketing premises

In the case of any termination of a franchise (entered into or renewed on or after June 19, 1978), or in the case of any nonrenewal of a franchise relationship (without regard to the date on which such franchise relationship was entered into or renewed) —

(1) if such termination or nonrenewal is based upon an event described in subsection (c)(5) of this section, the

franchisor shall fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will; and

(2) if such termination or nonrenewal is based upon an event described in subsection (c)(7) of this section and the leased marketing premises are subsequently rebuilt or replaced by the franchisor and operated under a franchise, the franchisor shall, within a reasonable period of time, grant to the franchisee a right of first refusal of the franchise under which such premises are to be operated.

(Pub.L. 95-297, title I, Sec. 102, June 19, 1978, 92 Stat. 324; Pub.L. 103-371, Sec. 2, 3, Oct. 19, 1994, 108 Stat. 3484.)

15 U.S.C. § 2803. Trial and interim franchises

(a) Nonapplicability of statutory nonrenewal provisions

The provisions of section 2802 of this title shall not apply to the nonrenewal of any franchise relationship —

(1) under a trial franchise; or

(2) under an interim franchise.

(b) Definitions

For purposes of this section —

(1) The term "trial franchise" means any franchise —

(A) which is entered into on or after June 19, 1978;

(B) the franchisee of which has not previously been a party to a franchise with the franchisor;

(C) the initial term of which is for a period of not more than 1 year; and

(D) which is in writing and states clearly and conspicuously —

(i) that the franchise is a trial franchise;

(ii) the duration of the initial term of the franchise;

(iii) that the franchisor may fail to renew the franchise relationship at the conclusion of the initial term stated in the franchise by notifying the franchisee, in accordance with the provisions of section 2804 of this title, of the franchisor's intention not to renew the franchise relationship; and

(iv) that the provisions of section 2802 of this title, limiting the right of a franchisor to fail to renew a franchise relationship, are not applicable to such trial franchise.

(2) The term "trial franchise" does not include any unexpired period of any term of any franchise (other than a trial franchise, as defined by paragraph (1)) which was transferred or assigned by a franchisee to the extent authorized by the provisions of the franchise or any applicable provision of State law which permits such transfer or assignment, without regard to any provision of the franchise.

(3) The term "interim franchise" means any franchise —

(A) which is entered into on or after June 19, 1978;

(B) the term of which, when combined with the terms of all prior interim franchises between the franchisor and the franchisee, does not exceed 3 years;

(C) the effective date of which occurs immediately after the expiration of a prior franchise, applicable to the marketing premises, which was not renewed if such nonrenewal —

(i) was based upon a determination described in section 2802(b)(2)(E) of this title, and

(ii) the requirements of section 2802(b)(2)(E) of this title were satisfied; and

(D) which is in writing and states clearly and conspicuously —

(i) that the franchise is an interim franchise;

(ii) the duration of the franchise; and

(iii) that the franchisor may fail to renew the franchise at the conclusion of the term stated in the franchise based upon a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located if the requirements of section 2802(b)(2)(E)(ii) and (iii) of this title are satisfied.

(c) Nonrenewal upon meeting statutory notification requirements

If the notification requirements of section 2804 of this title are met, any franchisor may fail to renew any franchise relationship —

(1) under any trial franchise, at the conclusion of the initial term of such trial franchise; and

(2) under any interim franchise, at the conclusion of the term of such interim franchise, if —

(A) such nonrenewal is based upon a determination described in section 2802(b)(2)(E) of this title; and

(B) the requirements of section 2802(b)(2)(E)(ii) and (iii) of this title are satisfied.

(Pub.L. 95-297, title I, Sec. 103, June 19, 1978, 92 Stat. 328.)

15 U.S.C. § 2804. Notification of termination or nonrenewal of franchise relationship

(a) General requirements applicable to franchisor

Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship —

(1) in the manner described in subsection (c) of this section; and

(2) except as provided in subsection (b) of this section, not less than 90 days prior to the date on which such termination or nonrenewal takes effect.

(b) Additional requirements applicable to franchisor

(1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect, as required by subsection (a)(2) of this section —

(A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable; and

(B) in the case of leased marketing premises, such franchisor —

(i) may not establish a new franchise relationship with respect to such premises before the expiration of the 30-day period which begins —

(I) on the date notification was posted or personally delivered, or

(II) if later, on the date on which such termination or nonrenewal takes effect; and

(ii) may, if permitted to do so by the franchise agreement, repossess such premises and, in circumstances

under which it would be reasonable to do so, operate such premises through employees or agents.

(2) In the case of any termination of any franchise or any nonrenewal of any franchise relationship pursuant to the provisions of section 2802(b)(2)(E) of this title or section 2803(c)(2) of this title, the franchisor shall —

(A) furnish notification to the franchisee not less than 180 days prior to the date on which such termination or nonrenewal takes effect; and

(B) promptly provide a copy of such notification, together with a plan describing the schedule and conditions under which the franchisor will withdraw from the marketing of motor fuel through retail outlets in the relevant geographic area, to the Governor of each State which contains a portion of such area.

(c) Manner and form of notification

Notification under this section —

(1) shall be in writing;

(2) shall be posted by certified mail or personally delivered to the franchisee; and

(3) shall contain —

(A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination or nonrenewal takes effect; and

(C) the summary statement prepared under subsection (d) of this section.

(d) Preparation, publication, etc., of statutory summaries

(1) Not later than 30 days after June 19, 1978, the Secretary of Energy shall prepare and publish in the Federal Register a simple and concise summary of the provisions of this subchapter, including a statement of the respective responsibilities of, and the remedies and relief available to, any franchisor and franchisee under this subchapter.

(2) In the case of summaries required to be furnished under the provisions of section 2802(b)(2)(D) of this title or subsection (c)(3)(C) of this section before the date of publication of such summary in the Federal Register, such summary may be furnished not later than 5 days after it is so published rather than at the time required under such provisions.

(Pub.L. 95-297, title I, Sec. 104, June 19, 1978, 92 Stat. 329.)

15 U.S.C. § 2805. Enforcement provisions

(a) Maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action

If a franchisor fails to comply with the requirements of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such franchisor. Such action

may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of —

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 2802 or 2803 of this title.

(b) Equitable relief by court; bond requirements; grounds for nonexercise of court's equitable powers

(1) In any action under subsection (a) of this section, the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 2802 or 2803 of this title, including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.

(2) Except as provided in paragraph (3), in any action under subsection (a) of this section, the court shall grant a preliminary injunction if —

(A) the franchisee shows —

(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(ii) there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

(B) the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

(3) Nothing in this subsection prevents any court from requiring the franchisee in any action under subsection (a) of this section to post a bond, in an amount established by the court, prior to the issuance or continuation of any equitable relief.

(4) In any action under subsection (a) of this section, the court need not exercise its equity powers to compel continuation or renewal of the franchise relationship if such action was commenced —

(A) more than 90 days after the date on which notification pursuant to section 2804(a) of this title was posted or personally delivered to the franchisee;

(B) more than 180 days after the date on which notification pursuant to section 2804(b)(2) of this title was posted or personally delivered to the franchisee; or

(C) more than 30 days after the date on which the termination of such franchise or the nonrenewal of such franchise relationship takes effect if less than 90 days notification was provided pursuant to section 2804(b)(1) of this title.

(c) Burden of proof; burden of going forward with evidence

In any action under subsection (a) of this section, the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b) or 2803 of this title, and, if applicable, that such franchisor complied with the requirements of section 2802(d) of this title.

(d) Actual and exemplary damages and attorney and expert witness fees to franchisee; determination by court of right to exemplary damages and amount; attorney and expert witness fees to franchisor for frivolous actions

(1) If the franchisee prevails in any action under subsection (a) of this section, such franchisee shall be entitled —

(A) consistent with the Federal Rules of Civil Procedure, to actual damages;

(B) in the case of any such action which is based upon conduct of the franchisor which was in willful disregard of the requirements of section 2802 or 2803 of this title, or the rights of the franchisee thereunder, to exemplary damages, where appropriate; and

(C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.

(2) The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury.

(3) In any action under subsection (a) of this section, the court may, in its discretion, direct that reasonable attorney and expert witness fees be paid by the franchisee if the court finds that such action is frivolous.

(e) Discretionary power of court to compel continuation or renewal of franchise relationship; grounds for noncompulsion; right of franchisee to actual damages and attorney and expert witness fees unaffected

(1) In any action under subsection (a) of this section with respect to a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 2802 of this title, the court may not compel a continuation or renewal of the franchise relationship if the franchisor demonstrates to the satisfaction of the court that —

(A) the basis for such nonrenewal is a determination made by the franchisor in good faith and in the normal course of business —

(i) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(ii) to materially alter, add to, or replace such premises,

(iii) to sell such premises,

(iv) to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, or

(v) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee; and

(B) the requirements of section 2804 of this title have been complied with.

(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness fees under subsection (d) of this section if such nonrenewal is prohibited by section 2802 of this title.

(f) Release or waiver of rights

(1) No franchisor shall require, as a condition of entering into or renewing the franchise relationship, a franchisee to release or waive —

(A) any right that the franchisee has under this subchapter or other Federal law; or

(B) any right that the franchisee may have under any valid and applicable State law.

(2) No provision of any franchise shall be valid or enforceable if the provision specifies that the interpretation or enforcement of the franchise shall be governed by the law of any State other than the State in which the franchisee has the principal place of business of the franchisee.

(Pub.L. 95-297, title I, Sec. 105, June 19, 1978, 92 Stat. 331;
Pub.L. 103-371, Sec. 4, Oct. 19, 1994, 108 Stat. 3485.)

15 U.S.C. § 2806. Relationship of statutory provisions to State and local laws

(a) Termination or nonrenewal of franchise

(1) To the extent that any provision of this subchapter applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

(2) No State or political subdivision of a State may adopt, enforce, or continue in effect any provision of law (including a regulation) that requires a payment for the goodwill of a franchisee on the termination of a franchise or nonrenewal of a franchise relationship authorized by this subchapter.

(b) Transfer or assignment of franchise

(1) Nothing in this subchapter authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) Nothing in this subchapter shall prohibit any State from specifying the terms and conditions under which any franchise or franchise relationship may be transferred to the designated successor of a franchisee upon the death of the franchisee.

(Pub.L. 95-297, title I, Sec. 106, June 19, 1978, 92 Stat. 332; Pub.L. 103-371, Sec. 5, Oct. 19, 1994, 108 Stat. 3485.)